No. 04-721
Title: Mike Evans, Acting Warden, Petitioner
v.
Reginald Chavis
Docketed: November 30, 2004
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (01-17072)
Decision Date: August 27, 2004

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Nov 22 2004	Petition for a writ of certiorari filed. (Response due December 30, 2004)
Jan 12 2005	DISTRIBUTED for Conference of February 18, 2005.
Jan 26 2005	Response Requested . (Due February 25, 2005)
Feb 28 2005	Brief of respondent Reginald Chavis in opposition filed.
Feb 28 2005	Motion for leave to proceed in forma pauperis filed by respondent.
Mar 16 2005	DISTRIBUTED for Conference of April 1, 2005.
Apr 27 2005	DISTRIBUTED for Conference of April 29, 2005.
May 2 2005	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
May 2 2005	Petition GRANTED.
May 26 2005	Motion to appoint counsel filed by respondent.
May 26 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including July 18, 2005.
May 31 2005	DISTRIBUTED for Conference of June 16, 2005.
Jun 20 2005	Motion to appoint counsel filed by respondent GRANTED. Peter K. Stris, Esquire, of Los Angeles, California is appointed to serve as counsel for the petitioner in this case.
Jul 15 2005	Joint appendix filed.
Jul 15 2005	Brief of petitioner Mike Evans, Acting Warden filed.
Jul 20 2005	SET FOR ARGUMENT on November 9, 2005.
Jul 21 2005	Extension of time within which to file respondent's brief on the merits to and including September 19, 2005.
Aug 5 2005	CIRCULATED.
Sep 2 2005	Record received from U.S. C.A. for Ninth Circuit. (1 envelope)
Sep 19 2005	Brief of respondent Reginald Chavis filed. (Distributed)
Sep 19 2005	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Sep 20 2005	Record for U.S.D.C. - Eastern Dist. of California received from Chambers of Judge Betty Fletcher. (1 box). There are sealed documents in this

record.

Oct 21 2005	Reply of petitioner Mike Evans, Warden filed. (Distributed)
Nov 9 2005	Argued. For petitioner: Catherine Baker Chatman, Deputy Attorney General, Sacramento, Cal. For respondent: Peter K. Stris, Los Angeles, Cal. (Appointed by this Court.)

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No. _____

OFFICE OF THE

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY LAMARQUE, Warden, *Petitioner,*

v.

REGINALD CHAVIS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Carey v. Saffold*, 536 U.S. 214, 225 (2002), this Court held that, where a California prisoner "unreasonably" delays in filing a state habeas corpus petition after denial in a lower court, that application is not "'pending' during this period" and therefore does not toll the one-year statute of limitations for filing federal habeas corpus petitions. The Court further held that the California Supreme Court's denial of a habeas petition on the merits does not itself "indicate that the petition was timely." *Id.* at 226. The question presented is:

Did the Ninth Circuit contravene this Court's decision in *Carey v. Saffold* when it held that a prisoner who delayed more than three years before filing a habeas petition with the California Supreme Court did not "unreasonably" delay in filing the petition -- and therefore was entitled to tolling during that entire period -- because the California Supreme Court summarily denied the petition without comment or citation, which the Ninth Circuit construes as a denial "on the merits"?

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IN THE SUPREME COURT OF THE UNITED STATES

No. _____

ANTHONY LAMARQUE, Warden, *Petitioner,*

v.

REGINALD CHAVIS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

Petitioner William A. Duncan (hereafter "the Warden")[1/] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The August 27, 2004, opinion of the Ninth Circuit Court of Appeals (App. A) is reported at 382 F.3d 921. The Ninth Circuit's September 14, 2004, order granting stay of mandate (App. B) is unpublished. The United States District Court's September 20, 2001, order adopting the findings and recommendations of the magistrate judge and dismissing the application for writ of habeas corpus (App. C) is unpublished.

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1. Warden Anthony Lamarque was named as respondent in the Ninth Circuit opinion. William A. Duncan is now serving as Acting Warden of the Salinas Valley State Prison in Soledad, California.

The magistrate judge's findings and recommendations (App. D) are unpublished.

The California Court of Appeal's September 29, 1994, denial of habeas corpus relief (App. E) is unpublished. The November 10, 1997, petition for writ of habeas corpus (App. F)[2/] and the California Supreme Court's April 29, 1998, denial (App. G) are unpublished.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 27, 2004. A timely motion to stay the mandate was granted on September 14, 2004. App. B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE STATUTE INVOLVED IN THE CASE

28 U.S.C. § 2244(d) sets forth the following one-year statute of limitations period and tolling provision for an application for a writ of habeas corpus by a state prisoner held in custody pursuant to the judgment of a state court:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

---

2. The Warden has included the first page only of the November 10, 1997, petition for writ of habeas corpus as an appendix. (App. F.) The first page reflects the filing date, which is all that is relevant to this petition for writ of certiorari.

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

In the decision below, the Ninth Circuit disregarded this Court's direct instructions regarding how it should determine whether habeas petitions filed by California prisoners in state appellate courts toll the one-year statute of limitations for filing federal habeas petitions. This blatant refusal to abide by this Court's decisions should not be countenanced, particularly given the frequency with which this issue arises and its importance to fulfilling Congress' objectives in enacting habeas corpus reforms. Certiorari should be granted.

A. Statutory Background and *Carey v. Saffold*

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year statute of limitations for state prisoners seeking habeas relief in federal courts. 28 U.S.C. § 2244(d)(1). The statute further provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation . . . ." 28 U.S.C. § 2244(d)(2). In *Carey v. Saffold*, 536 U.S. 214, this Court addressed when applications for state collateral review are "pending" following denials of relief by state trial courts.

This Court held that, generally, a state prisoner's application for habeas corpus relief is pending "as long as the ordinary state collateral review process is 'in continuance'—*i.e.*, 'until the completion' of that process." *Id.* at 219-20 (quoting Webster's Third New International Dictionary 1669 (1993)). "In other words, until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains 'pending.'" *Id.* at 220. Thus, an application for state collateral review is "pending" during the time between a lower state court's denial of an application for collateral review and the filing of a notice of appeal to a higher state court. *Id.* at 220-21.

This Court then applied this rule to California's collateral review scheme. In California, unlike many other states, the collateral review system does not require prisoners to seek appellate review of lower court determinations. Rather, a prisoner seeking collateral review files an original petition for writ of habeas corpus in the different state courts. *Id.* at 221. The Court concluded that a California prisoner's application may be considered "pending" within the meaning of § 2244(d)(2) during the interval between the denial of a state habeas petition and the filing of an original state habeas petition at the next level, as well as while the petition is under

consideration, thereby providing the possibility of continuous statutory tolling. *Id.* at 223.

Having resolved those threshold issues, this Court turned to the question presented in California's petition for a writ of certiorari: Whether an application for state collateral review is "pending" when the application filed in the state appellate court is untimely. The Court answered "no"; an untimely application for state collateral review is not "pending" during the period of delay. The one-year limitations period for filing federal habeas corpus petitions set forth in 28 U.S.C. § 2244(d) is therefore not tolled for that interval. *Id.* at 225.

This Court then applied this untimeliness rule to California's collateral review system. California law does not specify precise time limits for seeking collateral relief. Rather, a state prisoner must file a state petition for writ of habeas corpus "within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *In re Harris*, 855 P.2d 391, 398 n.7 (Cal. 1993), *cited in Saffold*, 536 U.S. at 221-22. This Court recognized that, for this reason, determining whether an application for state collateral review has been timely filed might be difficult in California. Nevertheless, held the Court, this is an inquiry that the federal court must undertake in determining whether the petitioner is entitled to tolling of the AEDPA limitations period. *Saffold*, 536 U.S. at 223, 225-26; *see also id.* at 235 (Kennedy, J., dissenting).

This Court explained that the federal court can determine whether a California petitioner is entitled to tolling during the interval between a lower court decision and the filing of a new petition in a higher court in one of two ways. First, and most obviously, the state court may "clearly rule[]" that the petitioner delayed unreasonably in filing the petition. *Id.* at 226. If so, "that would be the end of the matter" and there is no tolling. *Id.* Second, if the state court does not make specific findings of undue delay, the federal court must apply the *Harris*

reasonableness standard and determine whether the petitioner exercised due diligence in filing the state habeas petition. *Id.* at 225-26.

Turning to Saffold's case, this Court held that the Ninth Circuit erred in relying on the fact that the California Supreme Court denied Saffold's petition "on the merits and for lack of diligence." *Id.* The Ninth Circuit had reasoned that Saffold's petition had to have been timely filed because the phrase "on the merits" showed that the state court had considered the merits. *Id.* at 225 (citing *Saffold v. Newland*, 250 F.3d 1262, 1267 (9th Cir. 2000)). This Court disagreed, explaining that there are many reasons why a state court "will sometimes address the merits of a claim that it believes was presented in an untimely way." *Id.* Accordingly, "[g]iven the variety of reasons why the California Supreme Court may have included the words 'on the merits,' those words cannot by themselves indicate that the petition was timely." *Id.* at 226. The Court added that "the Ninth Circuit's apparent willingness to take such words as an absolute bellwether risks the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts. *See, e.g., Welch v. Newland*, 267 F.3d 1013 (C.A.9 2001) (finding limitations period tolled during 4-year gap)." *Id.* This Court therefore vacated the Ninth Circuit's judgment and remanded the case so that the Ninth Circuit could reconsider whether Saffold's state court petition was timely. *Id.* at 226-27.

B. State Court Proceedings

Respondent Reginald Chavis was found guilty in California state court on July 29, 1991, of attempted murder and mayhem with related findings of firearm use and great bodily injury. App. A at 4 (*Chavis v. Lamarque*, 382 F.3d 921, 923 (9th Cir. 2004)); App. D at 1-2. He was sentenced to state prison for an indeterminate term of life with the possibility of

parole, plus eight years for sentencing enhancements. App. A at 4 (*Chavis*, 382 F.3d at 923); App. D at 2. His conviction became final on January 26, 1993. App. D at 4.

Chavis filed his first state petition for writ of habeas corpus in the Sacramento County Superior Court on May 14, 1993, and it was denied by the court on July 30, 1993. App. A at 4 (*Chavis*, 382 F.3d at 923). On August 22, 1994, he filed a petition for writ of habeas corpus with the California Court of Appeal, which was denied on September 29, 1994. App. A at 5 (*Chavis*, 382 F.3d at 923).[3]

More than three years later, on November 10, 1997, Chavis filed a petition for writ of habeas corpus in the California Supreme Court, presenting essentially the same claims. App. A at 5 (*Chavis*, 382 F.3d at 923); App. D at 6. It is this state habeas petition that lies at the center of the instant dispute. On April 29, 1998, the California Supreme Court summarily denied the petition through an order stating, in its entirety, "Petition for writ of habeas corpus is denied." App. A at 5 (*Chavis*, 382 F.3d at 923); App. G.

Chavis then embarked on a second round of unsuccessful state filings. He filed his second habeas petition with the Sacramento County Superior Court on December 15, 1998, but the court ordered that petition "not filed" because Chavis had not properly filled out the appropriate forms. App. A at 5 (*Chavis*, 382 F.3d at 923). On January 25, 1999, he refiled his habeas petition with the superior court, which denied the petition on February 24, 1999. *Id.* Chavis then filed his second habeas petition with the California Supreme Court on December 17, 1999. App. A at 5 (*Chavis*, 382 F.3d at 924). The petition was denied on March 29, 2000 (App. D at 4), and that denial became final on April 28, 2000. App. A at 5 (*Chavis*, 382 F.3d at 927).

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3. Chavis did not exercise his option to file a petition for review in the California Supreme Court after this decision. *See* Cal. Penal Code, § 1506; Cal. Rules of Court, rule 28.

C. Federal District Court Proceedings

On August 30, 2000, Chavis filed his federal petition for a writ of habeas corpus. App. A at 6 (*Chavis*, 382 F.3d at 924). The magistrate judge issued findings and recommended that Chavis's federal habeas petition be denied as barred by the AEDPA statute of limitations. App. A at 6 (*Chavis*, 382 F.3d at 924); App. D at 7, 17-18. The district court adopted the findings and recommendation, and dismissed the petition.[4/] App. A at 6 (*Chavis*, 382 F.3d at 924); App. C at 2.

D. The Decision Below

The Ninth Circuit reversed. The court found that the one-year limitations period was not tolled for 363 days and that Chavis's petition was therefore timely (by two days).[5/]

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4. The Warden agrees with the district court's judgment, though not with its reasoning. All of the federal courts of appeal have granted habeas petitioners a one-year "grace period" following the enactment of AEDPA in which to file a timely habeas petition. *Duncan v. Walker*, 533 U.S. 167, 183 & n.1 (2001) (Stevens, J., concurring) (collecting cases). The district court seemed to assume that the AEDPA grace period could not, under any circumstances, be tolled by state habeas petitions filed and denied before its commencement. *But see Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001) ("We have noted that a state habeas petition filed *before* the AEDPA's statute of limitations begins to run tolls the limitation period.").

5. Specifically, the court found that the limitations period was not tolled between the following dates:

> (a) May 29, 1998 (the date on which the California Supreme Court's denial of his first habeas petition became final) and December 15, 1998 (the date on which Chavis improperly filed his second habeas petition with the superior court) -- a total of 200 days;
>
> (b) December 15, 1998 (the date on which Chavis improperly filed his second habeas petition with the superior court) and January 25, 1999 (when he filed a corrected petition with that court) -- a total of 40 days; and
>
> (c) April 28, 2000 (the date on which the California Supreme Court's denial of his second habeas petition became final) and August 30, 2000 (the date on which he filed his federal habeas petition) -- a total of 123 days.

App. A at 11-12 (*Chavis*, 382 F.3d at 927).

As noted, Chavis let more than three years pass between the California Court of Appeal's denial of his habeas petition and filing a petition presenting essentially the same claims in the California Supreme Court. Accordingly, contended the Warden, Chavis had unreasonably delayed in seeking relief from the California Supreme Court and thus did not have a state application for post-conviction review "pending" for the period of more than three years prior to that filing. In the absence of tolling for this period, the additional days in which the limitations period ran pushed Chavis well outside the one-year limitations period.

The Ninth Circuit ruled, however, that Chavis was entitled to statutory tolling throughout his entire first round of state petitions, including the entire three-year period of inactivity between the California Court of Appeal's denial of the petition and the filing of the next petition in the California Supreme Court. App. A at 9 (*Chavis*, 382 F.3d at 926). The court therefore found that the limitations period had run for only 363 days and thus had not expired. App. A at 12 (*Chavis*, 382 F.3d at 927).

The Ninth Circuit recognized that, according to this Court's decision in *Saffold*, Chavis's petition could not be considered "pending" during the three-year interval before the California Supreme Court petition was filed if Chavis had unreasonably delayed in filing it. App. A at 8 (*Chavis*, 382 F.3d

at 925 (citing *Saffold*, 536 U.S. at 223, 225)). The Ninth Circuit, however, refused to determine, in accordance with applicable state law, whether the summary denial by the state Supreme Court should be treated as a denial for lack of timeliness. App. A at 9 (*Chavis*, 382 F.3d at 926). Thus, the court did not apply the standard for timeliness set out by the California Supreme Court in *Harris*, under which a state habeas petition is timely if it is "filed within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *Harris*, 855 P.2d at 398 n.7.

Instead, the Ninth Circuit asserted that "the only relevant inquiry is whether the state court denied the petition as untimely." App. A at 9 (*Chavis*, 382 F.3d at 926). In this case, the California Supreme Court disposed of Chavis's petition by issuing a summary denial without comment or citation. App. G The Ninth Circuit observed that "[w]hen the California Supreme Court denies a habeas petition without comment or citation, we have long treated the denial as a decision on the merits." App. A at 9 (*Chavis*, 382 F.3d at 926). The court concluded that "because Chavis's November 1997 habeas petition to the California Supreme Court was denied on the merits, it was pending during the interval between the Court of Appeal decision and the Supreme Court petition and he is entitled to tolling." *Id.* The court did not explain how this approach could be reconciled with the holding in *Saffold*, 536 U.S. at 225-26, that a denial on the merits does not, in and of itself, indicate that a state habeas petition was timely filed. The court merely cited the Ninth Circuit's decision on remand in *Saffold*, which did not provide such an explanation either. *Id.* (citing *Saffold v. Carey*, 312 F.3d 1031, 1034-36 (9th Cir. 2002)).[6]

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6. The Ninth Circuit also rejected the Warden's contention that Chavis was not entitled to statutory tolling for the almost ten-month interval between denial of his second habeas petition in the superior court and the filing of his second habeas petition in the California Supreme Court. App. A at 7-8 & n.3; A at 11 (*Chavis*, 382 F.3d at 925 & n.3; *id.* at 927). Although the Warden believes the Ninth Circuit erred in holding that he waived this argument, the Warden is not asking this Court to review that holding.

REASONS FOR GRANTING THE PETITION

At issue here is the important federal question of how federal courts, for purposes of applying the AEDPA statute of limitations, should determine whether a state habeas corpus petition has been timely filed. Under the Ninth Circuit's rule, federal courts must treat a California state court's summary denial as conclusive evidence that a habeas corpus petition was timely filed under state law. Yet this Court, in *Carey v. Saffold*, vacated a Ninth Circuit judgment for invoking virtually an identical rule. This Court explained at length why a state appellate court's denial of a habeas petition on the merits "cannot by [itself] indicate that the petition was timely." *Saffold*, 536 U.S. at 226. Indeed, the Court criticized the Ninth Circuit rule for "threaten[ing] to undermine the statutory purpose of encouraging prompt filings in federal court." *Id.* It is difficult to imagine a more blatant instance of a court of appeals declining to follow the instructions of this Court than the decision below.

In California, many, if not most, petitions for writ of habeas corpus among the thousands filed each year in the state court of appeal and supreme court are summarily denied, as in this case, without comment or citation. Under the Ninth Circuit's rule, such state petitions must be deemed "pending" prior to filing even when they were filed after delays of many months or years, and even though such petitions would be untimely under the California state courts' doctrine of untimeliness. The Ninth Circuit's rule therefore insulates California prisoners from the effect of the AEDPA statute of limitation and frustrates Congress's intent to expedite the federal habeas process.

Furthermore, the Ninth Circuit's tolling rule conflicts with or is inconsistent with decisions of the Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits. Resolution of this case will ensure that the thousands of federal habeas petitions filed in California each year will be subject to the nationally binding tolling rule established by this Court's interpretation of 28 U.S.C. § 2244(d)(2) in *Carey v. Saffold* and will prevent the Ninth Circuit from unfairly granting statutory tolling in California cases "when it is highly likely that the prisoner failed to seek timely review in the state appellate courts." *Saffold*, 536 U.S. at 226.

A. The Ninth Circuit's Decision Conflicts With This Court's Decision In *Carey v. Saffold*

As previously discussed, this Court in *Carey v. Saffold* held that the AEDPA statute of limitations is not tolled "during th[e] period" in which a petitioner "delayed 'unreasonably' in seeking California Supreme Court review." *Saffold*, 536 U.S. at 225. This Court further held that, in determining whether Saffold had so delayed, the Ninth Circuit had erred in relying on the fact that the California Supreme Court denied Saffold's petition "on the merits and for lack of diligence." *Id.* at 225-26. The Ninth Circuit had reasoned that the petition had to have been timely filed because the phrase "on the merits" showed that the state court had considered the merits. *Id.* at 225 (citing 250 F.3d at 1267). This Court explained why that reasoning was flawed, and why a denial on the merits does not compel a conclusion that the petition was timely filed:

> A court will sometimes address the merits of a claim that it believes was presented in an untimely way: for instance, where the merits present no difficult issue; where the court wants to give a reviewing court alternative grounds for decision; or where the court wishes to show a prisoner

> (who may not have a lawyer) that it was not merely a procedural technicality that precluded him from obtaining relief. Given the variety of reasons why the California Supreme Court may have included the words "on the merits," those words cannot by themselves indicate that the petition was timely. And the Ninth Circuit's apparent willingness to take such words as an absolute bellwether risks the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts. *See, e.g., Welch v. Newland*, 267 F.3d 1013 (C.A.9 2001) (finding limitations period tolled during 4-year gap). The Ninth Circuit's rule consequently threatens to undermine the statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims.

Id. at 225-26.

Saffold's reasoning applies with equal force to the summary denial that issued in the present case, and should apply to the summary denials that will issue in thousands more California cases. If an explicit ruling on the merits (such as the ruling in Saffold's case) cannot be taken as an "absolute bellwether" of timeliness, it follows *a fortiori* that an implicit or presumed ruling on the merits (such as the ruling on Chavis's petition) cannot either.[7]

Nor does the absence of a specific finding of untimeliness in the California Supreme Court's order take this case outside the holding of *Saffold*, in which the California Supreme Court

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7. The California Supreme Court has explained that its practice is to issue a "summary denial" whenever a habeas petition does not state a prima facie case for relief or if the claims are procedurally barred. *People v. Romero*, 883 P.2d 388, 391 (Cal. 1994); *see also In re Clark*, 855 P.2d 729, 741, 760 (Cal. 1993). The California Supreme Court will sometimes - but not always - indicate a procedural bar by including a case citation in its summary denial. *In re Robbins*, 959 P.2d 311, 340 n.34 (Cal. 1998).

had denied Saffold's habeas petition "on the merits and for lack of diligence." The explicit holding of this Court was that "those words ['on the merits'] cannot by themselves indicate that the petition was timely." *Saffold*, 536 U.S. at 226. That holding, by its terms, applies to a summary disposition that implicitly denies a petition "on the merits." This is made crystal clear by this Court's reference to, and implicit criticism of, the Ninth Circuit's decision in *Welch v. Newland*, 267 F.3d 1013 (9th Cir. 2001), *vacated by Welch v. Carey*, 341 F.3d 869 (9th Cir. 2003) (granting rehearing en banc).

In *Welch*, the Ninth Circuit considered a petition filed in the California Supreme Court four years and five months after denial by the lower court. *Welch v. Newland*, 267 F.3d at 1015. The petition was denied by the California Supreme Court without comment or citation, just as in this case. *Id.* The Ninth Circuit allowed tolling for the four-year gap "[b]ecause the California Supreme Court had addressed the petitioner's claim on the merits." *Id.* at 1017. In *Saffold*, this Court quite correctly referred to *Welch* as an example of how the Ninth Circuit's reliance on a merits determination "risks the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts." *Saffold*, 536 U.S. at 226. Under the Ninth Circuit's reasoning in *Chavis*, however, Welch's habeas petition filed in the California Supreme Court after a delay of four years and five months would have to be considered timely.[8]

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8. Ultimately, in *Welch*, an en banc panel of the Ninth Circuit disallowed tolling for the period of four years and five months, on the ground that, by dropping his original claim, Welch had abandoned his first full round of review and had initiated a new round. *Welch v. Carey*, 350 F.3d 1079, 1082 (9th Cir. 2003) (en banc). The case therefore did not decide whether the four-year gap, followed by a summary denial without comment or citation, resulted in an untimely filing. *See id.* at 1083-84; *see also Gaston v. Palmer*, No. 01-56367, slip op. at 15250-51, 15254-56 (9th Cir. Oct. 28, 2004).

This case is indistinguishable from *Welch*, and like *Welch*, "threatens to undermine the statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." *Saffold*, 536 U.S. at 226. This Court's reference to *Welch* would have been nonsensical had the Court intended its ruling to apply only where a state court denied a petition expressly "on the merits" *and* "for lack of diligence." *See also id.* at 235 (Kennedy, J., dissenting) (expressing the understanding that the Court's rule would apply to those cases in which "the California courts routinely deny petitions filed after lengthy delays without making specific findings of undue delay").

To comply with this Court's holding in *Saffold*, the Ninth Circuit should have recognized that the state court's silent denial did not establish that the petition was timely field. The court should then have applied state law and determined whether Chavis acted "within a reasonable time after [he] or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *Harris*, 855 P.2d at 398 n.7. By declining to do so — and instead adopting a *per se* rule that summarily denied habeas petitions were timely filed under California law — the Ninth Circuit has disregarded this Court's decision in *Saffold*, disregarded California state law governing the timeliness of habeas petitions, and undermined the AEDPA limitations period. Under the Ninth Circuit's rule, all such summary denials will render the petition timely filed and all will provide tolling of the AEDPA period of limitation for the period of inactivity preceding the filing, even if the petitioner has delayed three years, thirteen years, or thirty years.

B. The Ninth Circuit's Decision Creates A Conflict Among The Circuits

By establishing a tolling rule that treats a California state court denial on the merits as conclusive evidence that the habeas corpus petition was timely filed under state law regardless of an actual delay of many months or years, the Ninth Circuit has created a direct conflict with the Fourth Circuit, and a conflict in principle with four other circuits, the Fifth, Seventh, Tenth, and Eleventh.

In *Allen v. Mitchell*, 276 F.3d 183 (4th Cir. 2001), the Fourth Circuit confronted the same situation that the Ninth Circuit faced here. As in California, there is no "fixed appellate deadline under North Carolina law." *Allen*, 276 F.3d at 186. Under North Carolina law, a non-capital prisoner whose "motion for appropriate relief" has been denied by the superior court may seek review by filing a petition for certiorari in the North Carolina Court of Appeals, and such a petition "must be filed 'without unreasonable delay.' N.C.R. App. P. 21(e)." *Id.* As in this case, the North Carolina Court of Appeals rejected Allen's petition through a summary order, without making any finding of untimeliness. *Id.* In direct conflict with the Ninth Circuit, the Fourth Circuit did not interpret the state court order as conclusively establishing that the state petition was timely.

The *Allen* court explained that, although Allen's petition had not been dismissed as untimely by the state court, it did not follow that there was no "unreasonable delay" under the North Carolina statute. *Allen*, 276 F.3d at 186-87. This is because "the court of appeals may simply have opted to 'excuse[] the untimeliness as a matter of state law and rule[] on the merits.'" *Id.* at 187 (quoting *Fernandez v. Sternes*, 227 F.3d 977, 981 (7th Cir. 2000)). Consequently, the *Allen* court remanded the case for further proceedings to determine whether Allen's certiorari petition was timely under the state's "without unreasonable delay" standard that required a determination of whether or not

the petition would be subject to dismissal under the equitable doctrine of laches. *Id.*

The Ninth Circuit's decision is also irreconcilable with the decisions of four other courts of appeal that have addressed the related issue of how to treat (for tolling purposes) state post-conviction applications that are undeniably untimely under the determinate state deadline, but which state courts nevertheless elect to review on the merits. Four of the five courts of appeal to address the issue have concluded that the federal limitations period is not tolled during the time period between the expiration of the deadline for filing the state application and the date on which the untimely application is finally filed. These decisions confirm the basic principle that eluded the Ninth Circuit in this case: that a state court's decision to rule on an application for collateral review on its merits is not inconsistent with that application still being untimely under state law such that it does not toll the federal one-year limitations period.

For example, in *Fernandez v. Sternes*, 227 F.3d at 980-81, the Seventh Circuit severely criticized the Ninth Circuit's tolling rule as set forth in *Saffold v. Newland*, 224 F.3d 1087 (9th Cir. 2000), *amended* 250 F.3d 1262, *vacated by Carey v. Saffold*, 536 U.S. at 227, stating that it preferred "reality" over the Ninth Circuit's "make-believe approach, under which petitions were *continuously* pending whenever a state court allows an untimely filing." The Seventh Circuit explained that:

> It is sensible to say that a petition continues to be "pending" during the period between one court's decision and a timely request for further review by a higher court (provided that such a request is filed); it is not sensible to say that the petition continues to be "pending" after the time for further review has expired without action to continue the litigation. That a request may be resuscitated does not mean that it was "pending" in the interim.

Fernandez, 227 F.3d at 980. Accordingly, the Seventh Circuit did not grant tolling for the interval between denial by the Illinois appellate court and the untimely filing in the Illinois Supreme Court. *Id.* at 981.

The *Fernandez* court's critique of the Ninth Circuit's original tolling rule is equally applicable to the tolling rule established in the instant case, which resurrects the approach initially taken by the Ninth Circuit in *Saffold*. The Ninth Circuit's continued practice of granting tolling under 28 U.S.C. § 2244(d)(2) for delays of many months or years "as long as the state court denied the belated request on the merits" continues to be, in the words of the Seventh Circuit, an "implausible understanding of § 2244(d)(2)" that will "sap the federal statute of limitations of much of its effect." *Id.* at 980.

Decisions from the Fifth, Tenth, and Eleventh Circuits show that *Allen* and *Fernandez* represent the majority view. *See Gibson v. Klinger*, 232 F.3d 799, 804 (10th Cir. 2000) (holding that a "state court's grant of leave to appeal out of time cannot erase the time period during which nothing was pending before a state court"); *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001) (holding that "[a] state court's subsequent decision to allow review may toll the time relating directly to the application, but it does not change the fact that the application was not pending prior to the application. Thus, after the appeal period has lapsed, an application ceases to be pending but a subsequently properly filed application entitles the petitioner to additional tolling beginning at the time of the 'proper' filing"); *Moore v. Crosby*, 321 F.3d 1377, 1381 (11th Cir. 2003) (holding "that the petitioner's belated appeal motion was not pending during the limitations period" because such an application "does not relate back so as to toll idle periods").

Just as prisoners who fail to timely file their applications for state collateral review in states with precise time limits will fail to qualify for tolling during the period of delay even though their state courts choose to decide their claims on the merits, prisoners in California who fail to timely file their state petitions

by engaging in substantial delay under California law should not qualify for tolling under *Carey v. Saffold* even though the state court addresses their claims on the merits and even though the state court does not make an explicit finding of untimeliness. The critical issue is not whether a California court fails to impose a procedural bar for lack of diligence and instead issues a summary denial on the merits. Rather, the critical issue is whether the prisoner has timely filed his state petition under California law, thereby qualifying for tolling under 28 U.S.C. § 2244(d)(2) and *Carey v. Saffold*. The Ninth Circuit's approach to this issue is contrary to the approach followed in the Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits. Certiorari should be granted to resolve the circuit conflict.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Dated: November 22, 2004

Respectfully submitted,

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CC:ky
SA2004US0004

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REGINALD CHAVIS, *Petitioner-Appellant,* v. **ANTHONY LEMARQUE, Warden,*** *Respondent-Appellee.*	No. 01-17072 D.C. No. CV-00-02496-WBS/ GGH OPINION

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, Chief Judge, Presiding

Submitted May 10, 2004**
San Francisco, California

Filed August 27, 2004

Before: Betty B. Fletcher, Stephen S. Trott, and
Raymond C. Fisher, Circuit Judges.

Opinion by Judge Betty B. Fletcher

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court. The court held that as long as the petitions are properly

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*Anthony LeMarque has replaced Sylvia Garcia as the warden of the Salinas Valley State Prison.

**This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. R. 34(a)(2).

filed, a habeas petitioner is entitled to tolling of the statue of limitations under the Antiterrorism and Effective Death Penalty Act (AEDPA) during subsequent rounds of state review.

Appellant Reginald Chavis, convicted of attempted first degree murder in California state court in 1991, petitioned for habeas corpus in federal district court in 2000. The district court found that Chavis was not entitled to statutory tolling for his first round of pre-AEDPA state habeas petitions that were filed in the Superior Court in 1993, the Court of Appeal in 1994, and the California Supreme Court in 1997, and denied on the merits in 1998. The court found that because Chavis's second round of state petitions, started in 1999, were filed more than one year after AEDPA's active date, Chavis's federal petition was barred.

Chavis appealed.

[1] Tolling of the AEDPA statute of limitations is allowed while a federal habeas petitioner has properly filed state habeas petitions that are pending. **[2]** "Pending" means in continuance or not yet decided. A petition is clearly pending after it is filed with a state court, but before that court grants or denies the petition. **[3]** Chavis's second round habeas petitions were pending while they were properly before the California courts for decision. **[4]** Because Chavis's 1997 habeas petition to the California Supreme Court was denied on the merits, it was pending during the interval between the Court of Appeal decision and the Supreme Court petition and he was entitled to tolling.

[5] A state habeas petition filed before the AEDPA statute of limitations begins to run tolls the limitation period. **[6]** A habeas petition is considered pending during one full round of state review, which in California includes petitions filed in Superior Court, the Court of Appeal, and the Supreme Court.

As long as the petition are properly filed, a habeas petitioner is also entitled to tolling during subsequent rounds of state review.

[7] Chavis was entitled to tolling for the entire first round of state petitions, which he began before AEDPA was enacted. Therefore, the one-year statute of limitations under AEDPA did not begin running until the day after California Supreme Court's denial of Chavis's habeas petition became final. **[8]** The statute was not tolled during the interval between the first and second rounds of Chavis's state petitions. **[9]** Tolling recommenced when Chavis properly started his second round of state habeas petitions. **[10]** The statute was again tolled during the second round of petitions until the date the California Supreme Court's denial of Chavis's second petition became final. Chavis's federal petition was timely filed within the one-year statute of limitations. **[11]** The district court's dismissal of Chavis's federal petition as untimely had to be reversed.

COUNSEL

Reginald Chavis, petitioner/appellant in propria persona.

Bill Lockyer, Attorney General of the State of California, and Catherine Chatman, Deputy Attorney General of the State of California, Sacramento, California, for respondent/appellee Anthony LeMarque.

OPINION

B. FLETCHER, Circuit Judge:

In 1991, Reginald Chavis was convicted of attempted first degree murder with the use of a weapon in Sacramento County Superior Court. He unsuccessfully challenged his conviction on direct appeal in California state courts and then filed two rounds

of state habeas petitions. All of Chavis's state petitions were denied, and he filed a federal habeas petition on August 30, 2000. The issue before us is whether Chavis's federal petition was filed within the one-year statute of limitations provided by the Antiterrorism and Effective Death Penalty Act ("AEDPA").[1] The district court dismissed the petition as untimely. We reverse.

I. Background

The timeliness of Chavis's federal petition depends on whether he is entitled to statutory tolling for each of his state habeas petitions. 28 U.S.C. § 2244(d)(2) (allowing tolling for "properly filed" state habeas petitions while such petitions are "pending"). We therefore set forth in detail the procedural history of his case.

A. Conviction and Direct Appeal

On July 29, 1991, a jury convicted Chavis of attempted murder for the shooting of Katrina Haines. Chavis was sentenced to life with the possibility of parole. Chavis appealed the conviction to the California Court of Appeal and California Supreme Court. Both appeals were denied, the latter on October 28, 1992.

B. First Round of State Habeas Petitions

Chavis filed a habeas petition in Sacramento Superior Court on May 14, 1993, which was denied on the merits on July 30, 1993. Chavis filed a substantially similar petition in the

1. AEDPA's one year statute of limitations applies because Chavis filed his federal habeas petition after AEDPA's effective date, which was April 24, 1996. *See Patterson v. Stewart*, 251 F.3d 1243, 1245 (9th Cir. 2001).

California Court of Appeal on August 22, 1994, and that petition was denied on September 29, 1994.

AEDPA and the one-year statute of limitations for federal habeas petitions took effect on April 24, 1996.

On November 5, 1997, the California Supreme Court received Chavis's habeas petition. The Court denied the petition on April 29, 1998, without any comment or case citation. That decision became final on May 29, 1998.

C. Second Round of State Habeas Petitions

Chavis filed a second habeas petition in Superior Court on December 15, 1998. On January 5, 1999, the Superior Court ordered the petition "not filed" because Chavis, a pro se prisoner, had not filled out the habeas form in accordance with court procedures. On January 25, 1999, Chavis refiled his habeas petition with the Superior Court in the proper format, and it was denied on February 24, 1999. The Superior Court held that the successive petition was barred for "procedural reasons" because it was presented in a "piecemeal" manner. *In re Chavis*, No. 99F00573 at *1 (Sacramento Super. Ct., Feb. 24, 1999) (citing *In re Clark*, 5 Cal. 4th 750, 774 (1993)). It also held that the claims were not presented with "due diligence" because seven years passed between Chavis's conviction and the second petition. *Id.* (citing *In re Robbins*, 18 Cal. 4th 770, 780 (1998)).

Chavis filed a second petition in the California Supreme Court on December 17, 1999. That petition was summarily denied with citations to *Clark*, 5 Cal. 4th 750, *Robbins*, 18 Cal. 4th 770, and *Ex parte Dixon*, 41 Cal. 2d 756, 759 (1953). The denial became final on April 28, 2000.

D. Federal Habeas Petition

Chavis filed his federal habeas petition with the district court on August 30, 2000. The magistrate judge made findings and recommendations that Chavis was not entitled to statutory tolling for state habeas petitions filed prior to the enactment of AEDPA, and that because all subsequent state petitions were filed more than one year after AEDPA's active date, Chavis's federal petition was barred. The district court adopted the findings and recommendations in full on September 18, 2001. Chavis appeals. The state concedes that the district court erred in its reasoning, but argues that Chavis is still not entitled to tolling for any of his state petitions.

II. Analysis

We review de novo the district court's dismissal of Chavis's 28 U.S.C. § 2254 petition on statute of limitations grounds. *See Jenkins v. Johnson*, 330 F.3d 1146, 1149 (9th Cir. 2003). We first hold that Chavis is entitled to tolling while his second round of state petitions was pending, even though the petitions were denied on procedural grounds, because the state court's ultimate decision on a particular petition does not affect whether that petition is "pending" *while the court considers it*. Second, we hold that Chavis is entitled to tolling for the three-year interval between his first round petitions to the California Court of Appeal and California Supreme Court — an interval during which AEDPA took effect — because the California Supreme Court did not dismiss the petition as untimely but rather decided it on the merits. Finally, we set forth the proper calculation of the periods for which Chavis is entitled to tolling, and conclude that Chavis's federal habeas petition was timely filed.

A. Definition of Pending

[1] 28 U.S.C. § 2244(d)(2) allows tolling of the AEDPA statute of limitations while a federal habeas petitioner has

"properly filed" state habeas petitions that are "pending."[2] The state contends that under *Carey v. Saffold*, 536 U.S. 214, 219-21 (2002), Chavis's second round petitions were never pending in the state courts, even while the courts had the petitions under submission, because the state courts eventually denied the second round petitions for procedural reasons. The state's argument misapprehends Supreme Court precedent and distorts the plain meaning of the word "pending."

The *Saffold* Court did rely on the state court's decision on whether a habeas petition was untimely to determine whether the state petition was pending, but in a different context: the Court was considering whether the word pending in the habeas statute applied to a time gap between the petitioner's habeas petitions in the California Court of Appeal and the California Supreme Court. *Id.* at 217-18. This was an issue because in California, petitioners file separate writs at each court level instead of appeals, and California uses a "reasonableness" standard rather than a strict time limit to determine whether the next writ was timely filed after the first was denied. *Id.* at 221-22.

[2] While *Saffold* clearly applies to determine whether a second round habeas petition was pending *between* levels of review, it is not relevant to whether the second round habeas petitions were pending *while the state courts were considering them*. "The dictionary defines 'pending' . . . as 'in continuance' or 'not yet decided.'" *Id.* at 219 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1669 (1993)). A

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2. A "properly filed" petition is one that has been "delivered and accepted in compliance with 'the applicable laws and rules governing filings.'" *Smith v. Duncan*, 297 F.3d 809, 812 (9th Cir. 2002) (quoting *Dictado v. Ducharme*, 244 F.3d 724, 726-27 (9th Cir. 2001)). The government only argues that one of Chavis's filings was improperly filed — the November 15, 1998 filing in Sacramento County Superior Court — and we discuss that filing *infra* at section II.C.

petition is clearly pending after it is filed with a state court, but before that court grants or denies the petition.

[3] Under the state's strained definition of "pending," a habeas petitioner would not know whether he was entitled to tolling for a petition filed in state court until the court granted or denied his petition. In the meantime, the AEDPA statute would be running and often would expire before the state court decided the case. So long as a state procedure for filing the habeas petition exists, the petition is pending while the state court considers it, whether the decision is ultimately on the merits or on procedural grounds. *See Jenkins*, 330 F.3d at 1153 (citing *Nino v. Galaza*, 183 F.3d 1003, 1005 (9th Cir. 1999)). Chavis's second round habeas petitions were pending while they were properly before the California courts for decision.[3]

B. Reasonableness of Delay Between First Round Petitions

The state also argues that the three-year delay between Chavis's first round California Court of Appeal and Supreme Court petitions was unreasonable, and therefore cannot be tolled. In contrast to the issue of what is "pending," this is an appropriate situation in which to apply *Carey v. Saffold*, because we must decide whether Chavis had a pending petition during "intervals between a lower court decision and a filing of a new petition in a higher court." *Saffold*, 536 U.S. at 222. The *Saffold* Court held that a petition is considered pending during such intervals unless the petitioner unreasonably delayed filing a new petition at a higher level. *Id.* at 223, 225. The Court then remanded for us to decide whether Saffold had unreasonably

3. The state does not argue that Chavis delayed unreasonably before filing his second round petition with the California Supreme Court after his second round Superior Court petition was denied. He is therefore entitled to tolling during the entire round.

delayed. *Id.* at 226. On remand, we held that because the California Supreme Court did not deny Saffold's petition as untimely, but rather on the merits and for lack of diligence in filing his initial petition, the delay in filing the California Supreme Court petition was not unreasonable. *Saffold v. Carey*, 312 F.3d 1031, 1035-36 (9th Cir. 2002).

The state argues that we must determine the reasonableness of the three-year delay during Chavis's first round of state petitions, looking to state law. However, we rejected that approach on remand in *Saffold*, and held that the relevant inquiry is whether the state court denied the petition as untimely. *Id.* at 1034-36.

[4] Under our decision in *Saffold*, because Chavis's November 1997 habeas petition to the California Supreme Court was denied on the merits, it was pending during the interval between the Court of Appeal decision and the Supreme Court petition and he is entitled to tolling. *See id.* When the California Supreme Court denies a habeas petition without comment or citation, we have long treated the denial as a decision on the merits. *Hunter v. Aispuro*, 982 F.2d 344, 348 (9th Cir. 1992) (9th Cir. 1992). Therefore, the California Supreme Court's summary denial was on the merits, and the petition was not dismissed as untimely. *See id.*; *see also Delhomme v. Ramirez*, 340 F.3d 817, 819, 820 n.2 (9th Cir. 2003) (noting that there was no indication that a state habeas petition was untimely where the California Supreme Court denied the petition without comment or citation). As a result, Chavis is entitled to tolling during his first round of state petitions.[4]

4. We note, as have other courts, that habeas petitioners should take care to avoid delays between state petitions. "Should the state courts wish (as will usually be the case) to deny such tardily-filed petitions on timeliness grounds, prisoners will find that the door to the federal courthouse is closed as well." *Romero v. Roe*, 130 F. Supp. 2d 1148, 1151 (C.D. Cal. 2001) ("Romero got lucky. The California Supreme Court denied his . . .

C. Chavis's Federal Habeas Petition Was Timely Filed

[5] We set forth in this section the proper calculation of the time periods for which Chavis was entitled to tolling, when he had properly filed state petitions pending. *See* 28 U.S.C. § 2244(d)(2). The district court dismissed the petition as untimely because it held that Chavis's first state habeas petitions, filed in 1993 and 1994, did not toll the one-year statute, since AEDPA was not enacted until 1996. The district court erred.[5] A "state habeas petition filed *before* the AEDPA statute of limitations begins to run tolls the limitation period." *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001) (citing *Tillema v. Long*, 253 F.3d 494 (9th Cir. 2001)).

[6] A habeas petition is considered pending during one full round of state review, which in California includes petitions filed in Superior Court, the Court of Appeal, and the Supreme Court. *Nino*, 183 F.3d at 1005-06. As long as the petitions are properly filed, a habeas petitioner is also entitled to tolling during subsequent rounds of state review. *See King v. Roe*, 340 F.3d 821, 823 (9th Cir. 2003) (per curiam) (recognizing that a habeas petitioner may be entitled to tolling during a second round of petitions, but holding that the statute is not tolled between rounds); *Dils v. Small*, 260 F.3d 984, 985-86 (9th Cir. 2001) (noting that petitioner was entitled to tolling during first, second, and third rounds of state habeas petitions but not between rounds); *see also Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998) ("[I]f a state allows petitioners to file second or subsequent petitions for post-conviction relief, federal courts should not undermine the state's decision by refusing to toll the one-year period of limitation of § 2244(d)(1) where a second or subsequent petition is pending in the state court system.").

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petition on the merits.").

5. The state concedes that this holding was error.

[7] Chavis filed a first round of state habeas petitions in the Superior Court in 1993, the Court of Appeal in 1994, and the California Supreme Court in 1997. Although AEDPA took effect on April 24, 1996, Chavis is entitled to tolling for the entire first round of state petitions, which he began before AEDPA was enacted. Therefore, the one-year statute of limitations under AEDPA did not begin running until the day after California Supreme Court's denial of Chavis's habeas petition became final on May 29, 1998. *See Smith v. Duncan*, 297 F.3d 809, 814 (9th Cir. 2002) (noting that the California Rules of Court provide that a California Supreme Court judgment becomes final thirty days after it is issued and holding that the federal statute begins running the day after the state judgment becomes final).

[8] The statute was not tolled during the interval between the first and second rounds of Chavis's state petitions. *See Biggs v. Duncan*, 339 F.3d 1045, 1048 (9th Cir. 2003). Nor was it tolled when Chavis submitted a petition on December 15, 1998 that was deemed "not filed" because Chavis did not use the proper form. *See Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that a state habeas petition is " 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings") (quoting 28 U.S.C. § 2244(d)(2)); *see also Smith*, 297 F.3d at 812. Therefore, Chavis's petition was not tolled between May 29, 1998 and January 25, 1999, a period of 240 days.[6]

[9] Tolling recommenced on January 25, 1999, when Chavis properly filed his Superior Court petition and started a second round of state habeas petitions. *See Smith*, 297 F.3d at 812 (holding that petition was "properly filed" even though the state

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6. The state's brief contains a miscalculation of this period: it states that there are 271 days rather than 240 days between May 29, 1998 and January 25, 1999.

court denied it as procedurally barred because the petition was delivered to and accepted by the state court).

[10] The statute was again tolled during the second round of petitions, from the proper filing in Superior Court on January 25, 1999, until April 28, 2000, the date the California Supreme Court's denial of Chavis's second petition became final. *See id.* Chavis filed a federal habeas petition on August 30, 2000, which was 123 days after the final denial of his last state petition. Chavis's federal petition was close to the deadline, but timely: there are only 363 days that were not tolled, so his petition was filed within the one-year statute of limitations.

III. Conclusion

[11] Chavis is entitled to tolling of the federal statute of limitations for the time during his first and second rounds of state habeas petitions but not between the two rounds. We reverse the district court's dismissal of Chavis's federal petition as untimely and remand for the district court to consider the merits of Chavis's petition.

REVERSED and REMANDED.

APPENDIX B

FILED
SEP 14 2004
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REGINALD CHAVIS, Petitioner-Appellant, v. **ANTHONY LEMARQUE, Warden,** Respondent-Appellee.	No. 01-17072 D.C. No. CV-00-02496-WBS/GGH Eastern District of California, Sacramento ORDER

Before: B. FLETCHER, Circuit Judge.

Appellee's Motion for stay of the issuance of the mandate pending application for writ of certiorari is granted. Fed. R. App. P. 41(d).

The mandate is stayed pending the filing of a petition for writ of certiorari in the Supreme Court. The stay expires ninety (90) days from the date of this order unless Appellee files a petition for the writ and so notifies the Clerk of our court in writing within the period of the stay. In that case, the stay shall continue until final disposition by the Supreme Court.

APPENDIX C

FILED
SEP 20 2001
Clerk, U.S. District Court
Eastern District of California
By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

REGINALD CHAVIS,

Petitioner, No. CIV S-00-2496 WBS GGH P

vs.

SYLVIA GARCIA,

Respondent. ORDER

_____/

Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On July 9, 2001, the magistrate judge filed findings and recommendations herein which were served on petitioner and

which contained notice to petitioner that any objections to the findings and recommendations were to be filed within twenty days. Petitioner has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed July 9, 2001, are adopted in full; and

2. Respondent's February 13, 2001, motion to dismiss is granted, and this action is dismissed.

DATED: September 18, 2001.

/s/
UNITED STATES DISTRICT JUDGE

/chav2496.804

APPENDIX D

FILED
JUL 09 2001
Clerk, U.S. District Court
Eastern District of California
By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

REGINALD CHAVIS,

Petitioner, No. CIV S-00-2496 WBS GGH P

vs.

SYLVIA GARCIA,

Respondent. FINDINGS & RECOMMENDATIONS

_____/

Introduction

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. This action was filed on August 30, 2000. Petitioner challenges his 1991 convictions for attempted first degree murder (Cal. Penal Code §§ 664, 187), and enhancements for infliction of great bodily injury (Cal. Penal Code § 12022.7),

and personal use of a firearm (Cal. Penal Code § 12022(a)).[1/] Petitioner was sentenced to state prison for life with the possibility of parole, plus eight years. The petition raises the following claims: 1) breakdown in attorney/client relationship infected all proceedings, 2) petitioner was denied substitution of counsel, 3) petitioner was not allowed to represent himself, in violation of the constitution, 4) ineffective assistance of trial counsel, 5) ineffective assistance of counsel on appeal, and 6) denial of due process when trial court disallowed evidence of third party's culpability.

Pending before the court is respondent's February 13, 2001, motion to dismiss on grounds that this action is barred by the statute of limitations. Petitioner has filed an opposition, to which respondent has filed a reply. After carefully reviewing the record the court recommends that the motion to dismiss be granted.

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1. The sentence for being armed with a firearm and mayhem were stayed.

Discussion

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) was enacted. AEDPA amended 28 U.S.C. § 2244(d)(1) so that it now provides,

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Petitioner was convicted by a jury and was sentenced on September 6, 1991. Petitioner filed an appeal with the state appellate court which was denied on July 30, 1992. Respondent's Exh. B. Petitioner then sought review before the California Supreme Court on September 4, 1992. That court denied the appeal on October 28, 1992.[2/] His conviction therefore became final on January 26, 1993, which was ninety days after the California Supreme Court denied his petition for review. See Bowen v. Roe, 188 F.3d 1157 (9th Cir. 1999). Because this date was prior to the enactment of the AEDPA, the statute of limitations expired one year from the enactment date, April 24, 1996. Unless otherwise tolled, petitioner then had one year from that date, i.e., until April 24, 1997, to file the instant petition. See Calderon v. United States Dist. Court (Beeler), 128 F.3d 1283, 1286-87 (9th Cir. 1997), overruled on other mounds, Calderon v. United States Dist. Court (Kelly), 163 F.3d 530, 540 (9th Cir. 1998);

---

2. Respondent has submitted this date without the opinion itself. Petitioner represents the date as "10-92."

Patterson v. Stewart, __ F.3d __ , 2001 WL 575465 (9th Cir. May 30, 2001). The instant federal petition, filed August 30, 2000, is over three years late.

A. Statutory Tolling

Section 2244(d)(2) provides that "the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

In Nino v. Galaza, 183 F.3d 1003 (9th Cir. 1999) the Ninth Circuit held that for purposes of § 2244(d) the time must be tolled for the entire period in which a petitioner is appropriately pursuing and exhausting his state remedies, i.e., from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge.

According to the parties' recitation of petitioner's collateral review history, petitioner first filed a habeas corpus petition with Sacramento County Superior Court on May 14, 1993. It was denied on July 30, 1993. Petitioner's next habeas petition was filed on August 22, 1994, with the California Court of Appeals. It was denied on September 24, 1994.[3] A habeas petition filed with the California Supreme Court on November 10, 1997 was denied on April 29, 1998. Petitioner then filed another habeas petition with the Sacramento County Superior Court on December 15, 1998,[4] which was ordered "not filed" on January 5, 1999. Petitioner then filed a third habeas corpus petition with the superior court which was denied on February 24, 1999.[5] Petitioner's last state habeas petition was filed with the state supreme court on December 17, 1999. It was denied on March 29,

3. According to respondent, it was denied on September 29, 1994.

4. Petitioner asserts that this petition was filed on May 27, 1998.

5. According to petitioner, either the second or third petition with the superior court was denied on April 15, 1999. Petition, at 5a.

2000.

These petitions for collateral review do not serve to toll the statute and therefore the reasons for the various courts' denials will not be discussed here. The first two petitions were filed and denied before the statute of limitations began to run, and therefore do not toll the statute. The series of petitions following the first two denials were all filed subsequent to the expiration of the statute of limitations, or after April 24, 1997, so they cannot toll the statute. See Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000) (under § 2244(d)(2), a petition must be "pending" in order to toll the limitations period).

Therefore, the present petition is barred. Petitioner makes two arguments in his opposition, that the state created impediments to his timely filing,[6] and that he is actually

6. The substance of petitioner's argument is directed at facts suggesting an equitable tolling analysis rather than a state created impediment under § 2244(d)(1)(B).

innocent.

B. Equitable Tolling

In Calderon v. U.S. District Court (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997), overruled on other grounds, Calderon v. U.S. Dist. Court (Kelly), 163 F.3d 530 (9th Cir. 1998), the Ninth Circuit found that the statute of limitations could be equitably tolled if extraordinary circumstances beyond a prisoner's control made it impossible to file the petition on time.

Equitable tolling will not be available in most cases because tolling should only be granted if extraordinary circumstances beyond a prisoner's control make it impossible for him to file a petition on time. Beeler, 128 F.3d at 1288-89. As held in Beeler, "[w]e have no doubt that district judges will take seriously Congress's desire to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is surmounted." 128 F.3d at 1289.

"Mere excusable neglect" is insufficient as an extraordinary circumstance. Miller v. New Jersey Dept. of Corrections, 145 F.3d 616, 619 (3rd Cir. 1998). Moreover, ignorance of the law does not constitute such extraordinary circumstances. See Hughes v. Idaho State Bd. of Corrections, 800 F.2d 905, 909 (9th Cir. 1986).

In the Calderon (Beeler) case, the Court of Appeals held that the district court properly found equitable tolling to allow Beeler more time to file his petition. Beeler's lead counsel withdrew after accepting employment in another state, and much of the work he left behind was not usable by replacement counsel- a turn of events over which the court found Beeler had no control. The Court of Appeals held that the district court properly found these were 'extraordinary circumstances' sufficient to toll the statute of limitations.[7]

---

7. See also Baskin v. United States, 998 F. Supp. 188 (D. Conn. 1998), wherein the court applied equitable tolling where petitioner's attorney failed to notify him of the denial of a petition for certiorari until thirteen months after the denial was entered.

The Ninth Circuit also found extraordinary circumstances in Calderon v. U.S. Dist. Ct. For Cent. Dist. Of Ca. (Kelly), 163 F.3d 530 (9th Cir. 1998) (en banc). The three reasons given which independently justified tolling were: a district court stay which prevented petitioner's counsel from filing a habeas petition, mental incompetency until a reasonable time after the court makes a competency determination, and the fact that petitioner did at one time have timely habeas proceedings pending which were mistakenly dismissed, not as a result of any doing by petitioner. Id. at 541-42. See also Miles v. Pruntv, 187 F.3d 1104, 1107 (9th Cir. 1999) (delay by prison in withdrawing funds from prisoner's trust account, preparing and mailing filing fee were circumstances beyond his control, qualifying him for equitable tolling).

Conversely, in U.S. v. Van Poyck, 980 F. Supp. 1108, 1110-11 (C.D. Cal. 1997), the court found that a petitioner's circumstances were not extraordinary: inability to obtain

transcripts from court reporters, and general prison lockdowns preventing the prisoner's access to the library and a typewriter which were necessary to his motion. See also Tacho v. Martinez, 862 F.2d 1376, 1381 (9th Cir. 1988) (reliance on incompetence of jailhouse lawyers not sufficient to justify cause to excuse procedural default); Turner v. Johnson, 177 F.3d 390, 392 (5th Cir. 1999) (prisoner's unfamiliarity of law did not toll statute); Eisermann v. Penarosa, 33 F.Supp.2d 1269, 1273 D.Haw. 1999) (lack of legal expertise does not qualify prisoner for equitable tolling); Henderson v. Johnson, 1 F.Supp.2d 650, 656 (N.D. Tex. 1998) (same); Fadayiro v. United States, 30 F.Supp.2d 772, 779-80 (D.N.J. 1998) (delay in receipt of transcripts does not justify equitable tolling).

In his opposition, petitioner outlines his attempts to exhaust his state court remedies, but states he was thwarted by the prison through required prison duties which was the

equivalent of a full time job, and that such duties occurred during the exact hours the law library was available. He contends he was able to file a petition with the appellate court in August, 1994, which was denied in September, 1994. At that time, however, petitioner claims he was denied access to the law library. He finally filed a prison grievance regarding lack of access, and it was repeatedly denied until February, 1996, when it was finally partially granted. At the time the AEDPA was enacted, petitioner claims that he was "barely ready to begin preparing his petition to the California Supreme Court." Oppo. at 6. Additionally, petitioner claims that in the years 1996, 1997, and 1998 Folsom Prison was subjected to a series of lockdowns, some of which lasted for months at a time. Furthermore, petitioner claims he was transferred from Folsom to Calipatria where he was separated from his legal property for two months. Finally, petitioner contends that he was unfamiliar with the law and initially was not aware that he had a claim for denial of access to the

courts. Consequently, petitioner asserts that the clock should "pause" from the date of AEDPA's enactment until the petition with the California Supreme Court was denied on April 29, 1998.[8/]

Respondent's reply proposes additional facts to contradict petitioner's argument. In regard to petitioner's job assignment, respondent represents that pursuant to a request by petitioner to change his job assignment, he was given a new assignment in March, 1996 which allowed him access to the law library. Thereafter, respondent argues, petitioner waited eighteen months before he filed the next habeas petition in the state court despite having access to legal materials. After this first post-expiration petition was denied by the state supreme court on April 29, 1998, petitioner waited another eight months to file a petition with the superior court.

---

8. Even such a pause would not rescue the untimeliness of the August 30, 2000, federal petition.

In regard to prison lockdowns, respondent contend that California State Prison Sacramento offered a paging system during these periods so that prisoners could still receive copies of legal materials. Furthermore, respondent argues that lockdowns do not constitute grounds for equitable tolling.

The court need not attempt to resolve disputed facts about petitioner's real access to the law library absent an evidentiary hearing in that petitioner's allegations, taken on their face, do not warrant equitable tolling. First, whether viewed as a tolling problem, or a commencement of the running of the limitations problem, 28 U.S.C. § 2244 (d)(l)(B), petitioner's allegations are insufficient and belied by his lengthy direct appeal and collateral attack petitions. The record demonstrates that most of petitioner's present issues were raised by him long ago in the state system. Claim 6 herein, excluding evidence of third party culpability, was an issue in the 1992 direct appeal to the California appellate

court. Ineffective assistance of trial and appellate counsel were raised as issues in at least the 1993 and 1994 state habeas petitions. In 1997, petitioner raised the issue that he had a complete conflict with his trial counsel. Only the evolved Marsden and self-representation issues were raised in later state petitions, but even these issues were first raised over one year prior to the filing of the present federal petition (see February 1999 state superior court petition).

In sum, petitioner's continuing evolution of his claims does not stand as a basis for permitting his present federal attack on his decade-plus old conviction. As seen from the record supplied by respondent, over these years, petitioner was not so impeded in his access to the courts that he could not file numerous petitions. Even if petitioner was impeded for awhile because of prison lockdowns and job conflicts with his desire to use the law library, such routine prison life problems do not constitute extraordinary circumstances. Moreover, as demonstrated by the previously cited cases,

ignorance of one's "best" claims does not suffice to toll the limitations period.

C. Suspension Clause/Innocence

Some courts have suggested that dismissal of actual or legal innocence claims on grounds that they are barred by the statute of limitations violates the Suspension Clause (U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus may not be suspended, unless when in Case of Rebellion or Invasion the public Safety may require it.")). See Rodriguez v. Artuz, 990 F. Supp. 275, 283 (S.D.N.Y. 1998), affirmed, 161 F.3d 763 (2nd Cir. 1998) ("where no claim of actual or legal innocence was raised, as long as the procedural limits on habeas leave petitioners with some reasonable opportunity to have their claims heard on the merits ...[there is no] suspension of the writ."). See also United States v. Zuno-Arce, 25 F. Supp. 2d 1087, 1099-1100 (C.D.Cal. 1998), affirmed, 245 F.3d 1108 (9th Cir. 2001).

Accordingly, this court considers whether petitioner's claims involve actual or legal innocence.

The petition raises the following claims: 1) breakdown in attorney/client relationship infected all proceedings, 2) petitioner was denied substitution of counsel, 3) petitioner was not allowed to represent himself, in violation of the constitution, 4) ineffective assistance of trial counsel, 5) ineffective assistance of counsel on appeal, and 6) denial of due process when trial court disallowed evidence of third party's culpability.

Attached as Exhibit B to respondent's motion to dismiss is a copy of the opinion of the California Court of Appeal denying his appeal. After reviewing this opinion and its factual summary, the court finds that petitioner's claims do not sufficiently implicate his innocence.

CONCLUSION

IT IS HEREBY RECOMMENDED that respondent's

February 13, 2001, motion to dismiss be granted and this action be dismissed.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: July 9, 2001.

/s/
GREGORY G. HOLLOWS
UNITED STATES DISTRICT JUDGE

GGH:jv:bb
chav2496.mtd.wpd

APPENDIX E

FILED
SEP 29 1994
Court of Appeal-Third District
Robert L. Liston, Clerk
By _____/s/_____ Deputy

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

IN RE REGINALD CHAVIS, ON HABEAS CORPUS
Petitioner

3 Crim. C019058
Sacramento

By the Court:

The petition for writ of habeas corpus is denied.

Dated: September 29, 1994

/s/
PUGLIA, P.J.

---

cc: See Mailing List

APPENDIX F

RECEIVED
NOV 5 - 1997
CLERK SUPREME COURT

S065691

Name Reginald Chavis H-08159

Address P.O. Box 29066

CDC or ID Number H-08159

SUPREME COURT
FILED
NOV 10 1997
Robert Wandruff Clerk
/s/
DEPUTY

FOR THE SUPREME COURT OF

THE STATE OF CALIFORNIA
(Court)

PETITION FOR WRIT OF HABEAS CORPUS

No. _____
(To be supplied by the Clerk of the Court)

Reginald Chavis H-08159 (in propria persona)
Petitioner

vs.

Respondent
Sue Hubbard (Acting Warden)

APPENDIX G

S065691

IN THE SUPREME COURT OF CALIFORNIA

IN RE REGINALD A. CHAVIS

ON

HABEAS CORPUS

Petition for writ of habeas corpus is DENIED.

SUPREME COURT
FILED
APR 29 1998
Robert Wandruff Clerk
/s/
DEPUTY

/s/
Chief Justice

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY LAMARQUE, Warden, *Petitioner,*

v.

REGINALD CHAVIS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I, Catherine Chatman, a member of the Bar of this Court, hereby certify that on this 22th day of November, 2004, a copy of Petition For Writ Of Certiorari and Appendix, in the above-captioned case was mailed, via first class postage prepaid, in the United States Postal Service to:

Reginald Chavis (3 copies)
H-08159
Salinas Valley State Prison
PO Box 1020
Soledad, CA 93960-1020
(831) 678-5500

All persons required to be served have been so served.

Dated: November 22, 2004

Catherine Chatman

CATHERINE CHATMAN
Deputy Attorney General
Counsel of Record
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5364

(8)

ORIGIONAL

NO. 04-721

SUPREME COURT OF THE UNITED STATES

ORIGINAL

Supreme Court, U.S.
FILED
FEB 28 2005
OFFICE OF THE CLERK

ANTHONY LAMARQUE, Warden, Petitioner

V.

REGINALD CHAVIS, Respondent

RESPONSE REQUESTED

RECEIVED
MAR 8 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED FORMA PAUPERIS

IN OPPOSITION OF WRIT OF CERTIORARI PETITION TO THE UNITED STATES SUPREME COURT

Your respondent, Reginald Chavis, asks leave to file the attached "OPPOSITION OF WRIT OF CERTIORARI" to THE UNITED STATE SUPREME COURT without prepayment and costs, and to proceed in forma pauperis, under RULES 12.2 and 39 of the U.S. SUPREME COURT RULES, and 28 U.S.C. §1915(a).

Your respondent has previously been granted leave to proceed in forma pauperis in the following courts:

BEST AVAILABLE COPY

1.) The United States Court of Appeals for THE NINTH CIRCUIT

2.) United States District Court for the Eastern District of California

Your respondents declaration in support of this motion is attached.

February 20, 2005

Respectfully Submitted,

Reginald Chavis

Respondent IN Proper Person

SUPREME COURT OF THE UNITED STATES

ANTHONY LAMARQUE, Warden, Petitioner

V.

REGINALD CHAVIS, Respondent

NO. 04-721

DECLARATION IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Reginald Chavis, am the respondent in the above entitled case. In support of my motion to proceed in forma pauperis, I state that because of my poverty I am unable to pay the costs of this case, or to give security therefor; an I believe I am entitled to redress.

1. For both you and your spouse estimate the amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is amounts before any deductions or taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ Ø	$ N/A	$ Ø	$ NA
Self-employment	$ Ø	$ N/A	$ Ø	$ N/A
Income from real property (such as rental income)	$ Ø	$ N/A	$ Ø	$ N/A
Interests and dividends	$ Ø	$ N/A	$ Ø	$ N/A
Gifts	$ Ø	$ N/A	$ Ø	$ N/A
Alimony	$ Ø	$ N/A	$ Ø	$ N/A
Child support	$ Ø	$ N/A	$ Ø	$ N/A
Retirement (such as social security, pensions, annuities, insurance)	$ Ø	$ N/A	$ Ø	$ N/A
Unemployment payments	$ Ø	$ NA	$ Ø	$ N/A
Public assistance (such as welfare)	$ Ø	$ N/A	$ Ø	$ N/A
Other (specify): _____	$ Ø	$ NA	$ Ø	$ N/A
Total monthly income	$ Ø	$ Ø		

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly Pay
NONE	N/A	N/A	$ Ø
NONE	N/A	N/A	$ Ø
NONE	N/A	N/A	$ Ø

3. List your spouses employment history for the past two years, most recent first. (Gross monthly pay is before taxes or deductions)

Employer	Address	Dates of employment	Gross monthly pay
N/A	N/A	N/A	$ Ø
N/A	N/A	N/A	$ Ø
N/A	N/A	N/A	$ Ø

4. How much cash do you and your spouse have? $ Ø

Below, state any money that you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount you spouse has
NONE	N/A	$ Ø	$ Ø
NONE	N/A	$ Ø	$ Ø
NONE	N/A	$ Ø	$ Ø

5. List the assets, and their values, which you or your spouse owns. Do not list clothing and ordinary household furnishings

☐ Home
Value N/A

☐ Other real estate
Value N/A

☐ Motor Vehicle #1
Year, make & model NONE
Value N/A

☐ Motor Vehicle #2
Year, make & model NONE
Value N/A

☐ Other assets
Description NONE
Value N/A

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
NONE	$ Ø	$ Ø
NONE	$ Ø	$ Ø
NONE	$ Ø	$ Ø

7. State the persons who rely on you or your spouse for support.

Name	Relationship	AGE
NONE	N/A	N/A
NONE	N/A	N/A
NONE	N/A	N/A

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ Ø	$ Ø N/A
Are real estate taxes included? ☐ yes ☐ no		
Is property insurance included? ☐ yes ☐ no		
Utilities (electricity, heating fuel, water, sewer, and telephone.)	$ Ø	$ N/A
Home maintenece (repairs and upkeep)	$ Ø	$ N/A
Food	$ Ø	$ N/A
Clothing	$ Ø	$ N/A
Laundry and dry cleaning	$ Ø	$ N/A
Medical and dental expenses	$ Ø	$ N/A

	You	Your spouse
Transportation (not including motor vehicle payments.)	$ Ø	$ N/A
Recreation, entertainment, newspapers, magazines, ect.	$ Ø	$ N/A
Insurance (not deducted from wages or included in mortgage payments)		
Home owners or renter's	$ Ø	$ N/A
Life	$ Ø	$ N/A
Health	$ Ø	$ N/A
Motor Vehicle	$ Ø	$ N/A
Other: _____	$ Ø	$ N/A
Taxes (not deducted from wages or included in mortgage payments) (specify): _____	$ Ø	$ N/A
Installment payments	$ Ø	$ N/A
Motor Vehicle	$ Ø	$ N/A
Credit Card(s)	$ Ø	$ N/A
Department store(s)	$ Ø	$ N/A
Other: _____	$ Ø	$ N/A
Alimony, maintenece, and support paid to others	$ Ø	$ N/A
Regular expenses for operation of business profession, or farm (attach detailed statement)	$ Ø	$ N/A
Other (specify): _____	$ Ø	$ N/A
Total monthly expenses:		

9. Do you expect any major changes to your monthly income or expenses or in your assets, or liabilities during the next 12 months?

☐ yes ☒ no If yes, describe on an attached sheet

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? yes (no)

If yes, how much? N/A

If yes, state the attorneys name, address, and telephone number:

11. Have you paid – or will you be paying – anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ yes ☒ NO

If yes, how much? N/A

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case. I have been imprisoned as a ward of the State of California for the past 14 years and I am unmarried and unable to generate any personal income, and my institution of confinement will not cover the cost of litigating this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: February 18, 2005

By: Reginald Chavis
Respondent In Propria Persona

VERIFICATION

(C.C.P. §§ 446, 2015.5; 28 U.S.C. § 1746)

I, Reginald Chavis, declare under penalty of perjury that:

I am the Respondent in the attached matter; I have read the foregoing document(s) and know the contents thereof; that the same is true and correct of my own knowledge, and if called to testify to the contents thereof, I could do so competently as a sworn witness.

Executed this 24th day of February, 2005, at the Salinas Valley State Prison, Soledad, California 93960-1050.

Reginald Chavis
Declarant

.....

DECLARATION OF SERVICE BY MAIL

(C.C.P. §§ 446, 2015.5; 28 U.S.C. § 1746)

I, Reginald Chavis, declare: That I am a resident of Salinas Valley State Prison, Soledad, California; I am over the age of 18 years; that [☒ I am/ ☐ I am not] a party to the above entitled action; that I served a true copy of the document(s) entitled:

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

on the below listed person(s)/party(s) by placing a true copy of said document(s) into a sealed envelope with the appropriate postage affixed thereto, and delivering said envelope to prison staff for mailing by the process provided for at the Salinas Valley State Prison, Soledad, California, addressed as follows:

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
1 FIRST STREET N.E.
WASHINGTON, D.C.
20543-0001

ATTORNEY GENERAL'S OFFICE
C/O CATHERINE CHAKMAN
1300 I STREET
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

I declare under penalty of perjury that the foregoing is true correct of my own knowledge; executed this 24th day of February, 2005, at Salinas Valley State Prison, Soledad, California 93960-1050.

Reginald Chavis
Declarant

ORIGIONAL

NO. 04-721

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY LAMARQUE WARDEN, PETITIONER

V.

REGINALD CHAVIS, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REGINALD CHAVIS, RESPONDENT
IN PROPRIA PERSONA
P.O. Box 1050
SOLEDAD, CALIFORNIA
93960-1050

QUESTION PRESENTED

Did the Ninth Circuit, in this case, erroneously fail to give consideration to the question of whether your respondent, Reginald Chavis, "delayed unreasonably" in State court in between the denial of his State petition for habeas corpus to the Court of Appeal of California (September ###), and his first round petition to the Supreme Court of California (November 16, 1997), after the California Supreme Court gave only a summary denial for it's decision?

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IN THE SUPREME COURT OF THE UNITED STATES

NO. 04-721

ANTHONY LAMARQUE Warden, Petitioner

V.

REGINALD CHAVIS, Respondent

QUESTION PRESENTED

Did the Ninth Circuit, in this case, erroneously fail to determine whether your respondent, Reginald Chavis, delayed unreasonably in between seeking his state petition for habeas corpus to the Court of Appeal of California (September 1999), and his first round petition to the Supreme Court of California (November 16, 1997)" such that it can not be said that [respondent's] application was 'pending'", thereby disentitling him to tolling during that period of time.

ANSWER IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI

Respectfully, your respondent Reginald Chavis, opposes any grant of the petitioner (Warden's), petition for writ of Certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit in this case.

REASON FOR DENYING PETITION

A. PROCEDURAL WAIVER

In the decision below, the Ninth Circuit declined to determine whether a habeas petition filed by your respondent in the California Supreme Court (denied summarily April 28, 1998), was "unreasonably" delayed in it's filing thereby disentitling your respondent to tolling under the AEDPA statute.

Although the Ninth Circuit did, in fact, decline to make such a determination, this was a proper exercise of the court's discretion, in light of the fact that it was not required to make any determination, because your petitioner is procedurally barred from consideration of this question by the court.

Your petitioner failed to forward his "unreasonable delay" contention to the district court jurisdiction. Your respondent, in his reply brief to the Ninth Circuit (at pg.5) timely objected to any such consideration of the question on the basis that he is procedurally barred from consideration.

Therefore, under the circumstances present in this case, the Ninth Circuit did not, as your petitioner contends, disregard this court's instructions, but properly exercised it's own discretion to decline determination of the aggrieved question by your petitioner as he is procedurally barred.

B. STATUTORY REASONS

1 STATUTE INVOLVED

28 U.S.C. § 2244 (d) sets forth the following one-year statute of limitations period, and tolling provision, for an application for a writ of habeas corpus by a state prisoner held in custody pursuant to the judgement of a state court:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgement of a State court. The limitation period shall run the latest of --

(A) the date on which the judgement became final by the conclusion of direct review, or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application, Created by state action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim, or claims, presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction, or other collateral review, with respect to the pertainent judgement or claim is pending, shall not be counted toward any Period of limitation under this subsection.

2 UNDER THE STATUTE THE COURT HAD NO DUTY TO MAKE A FURTHER DETERMINATION

Even if your petitioner had not procedurally defaulted his Claim, the language used in the Anti-Terrorism and Effective Death Penalty Act of 1996 makes it clear that the court below was not duty bound to make any further determination under the circumstances of this particular case.

28 U.S.C. § 2244 (d)(2) states:

The time during which a **properly filed** application for State post conviction, or other collateral review with respect to the Pertainent judgement or claim **is pending shall not be counted toward any period of limitation** under this subsection.

In the decision below (Chavis V. La Marque 382 F.3d 921) [Appendix A] the court properly found 1) that all of your respondent's first round petitions (of which your petitioner disputes) were "properly filed" applications within the meaning of the AEDPA statute and, 2) that a habeas petition is considered pending during one full round of state review, which in California includes petitions filed in the Superior Court, the court of Appeal, and the Supreme Court and 3) that your respondent is entitled to tolling for the **entire first round** of state petitions considered "pending" within the meaning of the AEDPA statute, which he began before AEDPA was enacted.

Your petitioner argues that the court below **must** determine the reasonableness of the three year delay during your

respondent's first round of state petitions looking to state law. He is mistaken. After answering the pre requisite questions of whether your respondent's first round state petitions were both "properly filed," and "pending" within the meaning of the AEDPA Statute, (and favorably to your respondent), the court correctly interprets it has no further duty to make a reasonableness determination. The language used in the statute is instructive. It states: 28 U.S.C. §2244(d)(2)

"The time during which a **properly filed application** for State post-conviction, or other collateral review with respect to the pertainent judgement, or claim, **is pending shall not be counted** toward any period of limitation under this subsection."

Pursuant to this Court's holdings in Carey V. Saffold 536 U.S. 214 the court below concluded; 1) that your respondent's first round petitions were "properly filed" [at footnote 2] "A 'properly filed' petition is one that has been delivered and accepted in compliance with the 'applicable laws and rules governing filings'" Smith V. Duncan 297 F.3d 809, 812 (9th cir 2002) (quoting Dictado V. Ducharme 244 F.3d 724, 726-27 (9th cir 2001). 2) That all of your respondent's petitions were "pending" while they were properly before the California courts for decision (noting: so long as a state Procedure ~~exists~~ for filing the habeas petition exists, the Petition is pending while the state court considers it, whether the decision is ultimately on the merits or on procedural

grounds. See Jenkins V. Johnson 330 F.3d 1146, 1149 (9th Cir 2003) at 1153 (citing Nino V. Galaza 183 F.3d 1003, 1005 (9th cir 1999)).

Consistent with it's conclusions in Saffold V. Newland 1250 F.3d at 1266 (9th cir 2001) the court below defines pending: "we hold that the AEDPA statute of limitations is tolled for 'all of the time during which a state prisoner **is attempting, through proper use of state court procedures**, to exhaust state court remedies with regard to a particular post-conviction application.' Applying these principles to California's post conviction procedure, we hold that the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge."

A. CAREY V. SAFFOLD AND CALIFORNIA'S COLLATERAL REVIEW SYSTEM

As noted by this court in Carey V. Saffold 122 S. Ct. 2134 "California's collateral review system differs from that of other States in that it does not require, technically speaking, appellate review of a lower court determination. Instead it contemplates that a prisoner will file a new 'original' habeas petition. And it determines the timeliness of each filing according to a 'reasonableness' standard.

The upshot is that California's collateral review process functions very much like that of other States, but for the

fact that it's timeliness rule is indeterminate. Other States (with the exception [***16] of North Carolina, see Allen V. Mitchell 276 F. 3d 183, 186 (CA4 2001) specify time limits such as 30 or 45 days, within which an appeal must be taken, while California applies a general 'reasonableness' standard. Still we do not see how that feature of California's law could make a Critical difference. As mentioned, AEDPA's tolling rule is designed to protect the principles of 'comity, finality, and federalism' by promoting 'the exhaustion of state remedies while respecting the interests in the finality of state court judgements.'" Duncan V. WALKER 533 U.S. at 178 (internal quotation marks omitted)." It modifies the one-year rule (a rule that prevents prisoners from delaying their federal filings) in order to give states the opportunity to complete one full round of review free of federall interference. Inclusion of California's 'reasonableness' periods carries out that purpose in the same way and to the same degree, as does inclusion of the more specific appellate filing Periods prevalent in other states. And exclusion of those Periods in California would undermine AEDPA's statutory goals just as it would in those states."

C. THE NINTH CIRCUIT'S DECISION IS WHOLLY CONSISTENT WITH THIS COURT'S CAREY V. SAFFOLD'S

Your petitioner argues the Ninth Circuit must, in this case, determine whether your respondent "unreasonably delayed" in his state court petition, because the Ninth Circuit has regarded the State Supreme Court's summary denial as a denial on the merits. This must be done, he argues, because, in Saffold, this court remanded in that case, where the California Supreme Court wrote that it denied the petition "on the merits and for lack of diligence", and this court stated: "Given the varaiety of reasons why the California Supreme Court may have included the words 'on the merits' those words by themselves cannot indicate that the petition was timely."

Your petitioner's position misappropriates the differences between the Circumstances present in this case, and those from Saffold. It also misapprehends the court's duties and powers.

In Saffold the California Supreme Cart wrote that it denied Saffolds petition "on the merits and for lack of diligence." In this (your respondent's) case, the California Supreme Court gave a summary denial. In Saffold, where the state court gave some indication of

untimeliness issues entangled in it's denial, such an indication called for the court to exercise it's power to determine, in that case, how that sort of state court denial affected the application of AEDPA's statute of limitations.

In your respondent's case, the court is not required, ie, it is not a mandatory duty that it exercise it's discretion, to make such a determination, because as the court below points out in it's opinion, "When the California Supreme Court denies a habeas petition without comment or citation, we have long treated the denial as a decision on the merits. Hunter V. Aispuro 982 F. 2d 344, 348 (9th Cir 1992). Therefore, the California Supreme Court's denial was on the merits and the petition was not dismissed as untimely. See id., see also Delhomme V. Ramirez 340 F. 3d 817, 819, 820 n. 2 (9th Cir 2003) (noting that there was no indication that a state habeas petition was untimely where the California Supreme Court denied the petition without comment or citation. As a result, Chavis is entitled to tolling during his first round of state Petitions.

Your petitioner's arguments displaces the AEDPA's actual purpose.

"The whole purpose of the AEDPA's requirement is to Permit State courts to address the merits of the petitioner's

claims. As we observed in Nino "tolling the AEDPA's Statute of limitations until the state has fully completed it's review, reinforces comity and respect between our respective judicial systems" Saffold V. Newland 250 F. 3d [redacted] 1262 at 1267 quoting Nino V. Galaza 183 F. 3d 1003 (9th Cir 1999) (noting also "We fail to see why an untimeliness ruling entangled with the federal constitutional merits, which is insufficient to [redacted] cause a default of a federal claim, should be sufficient to defeat tolling of the AEDPA limitation.") (see also at footnote 8: "Such procedural bars to the obtaining of relief do not prevent a petition from being 'properly filed', and review therefore from being [redacted] "available" even if unsuccessful.")

Your petitioner's arguments must fail.

The language set forth in the statute of 28 U.S.C. 2244(d)(2) is instructive. Where your respondent's State application was both "properly filed" and "pending" within the meaning of the statute "The time shall not be counted toward any period of limitation under this subsection. Therefore,

no further determination was required from the court. Though a petitioner's individual circumstances, which define whether his particular application is "properly filed;" and "pending," might vary under California's Collateral review system from other states', this fact does not create a conflict between the circuits so long as the function, and purpose of the statute was justly served in this instance as equally as it is in the other circuits Certiorari should be denied and the petition should be dismissed.

It was pointed out in In re Harris 21 Cal.Rptr. 2d at 379 that "a Petitioner seeking relief on habeas corpus need only file a petition without substantial delay, or if delayed, adequately explain the delay." THIS is the State authority [redacted] on which your petitioner relies on. However, at the time that the State Petition in question by your [redacted] respondent was filed to the Supreme Court of California, in compliance with California's procedures, and in the event that the court were to determine your respondent delayed, your respondent did, in fact, give an explanation within the habeas corpus form's format to the California Supreme Court. See (Appendix B) Yet the California Supreme Court did not, still, write in it's decision that it found your respondent's petition to be "Unreasonably delayed", but gave a summary denial though it clearly had the power to make such a determination; and to give such a ruling if it found it to be appropriate at that time. In light of this evidence that the California Court did give it's consideration to the question, as per California's procedure, and still did not write that your respondent "unreasonably delayed,"

it is conclusive that the court's summary denial was, in fact, a denial on the merits which eliminates a call for a secondary determination by the federal courts.

CONCLUSION

Rule 10 of the Rules of THE SUPREME COURT of the UNITED STATES states: "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." No compelling reasons exist in this instance as the court below was not required to make any further determination in this case.

For the reasons set forth above, the petition for writ of certiorari should be denied.

Dated: February 19, 2005

Respectfully Submitted,

Reginald Chavis

Reginald Chavis
Respondent In Propria Persona

APPENDIX-A

Chavis v. Lemarque

382 F.3d 921

4 Cal. Daily Op. Serv. 7936, 2004 Daily Journal D.A.R. 10,703

United States Court of Appeals,
Ninth Circuit.

Reginald CHAVIS, Petitioner-Appellant,
v.
Anthony LEMARQUE, Warden, (FN*) Respondent-Appellee.

No. 01-17072.
Submitted May 10, 2004. (FN**)

Filed Aug. 27, 2004.

Background: Inmate filed petition for writ of habeas corpus. The United States District Court for the Eastern District of California, William B. Shubb, C.J., dismissed petition as untimely, and inmate appealed.

Holdings: The Court of Appeals, Betty B. Fletcher, Circuit Judge, held that:

(1) petitioners's state habeas corpus petitions were pending while petitions were before state courts for decision, and thus, Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period for bringing federal habeas corpus petition was tolled during this time, and

(2) petitioners's first round of state habeas corpus petitions was pending during three-year interval between decision of Court of Appeal and decision of California Supreme Court, and thus, AEDPA's one-year limitations period for bringing federal habeas corpus petition was tolled during this time.

Reversed and remanded.

West Headnotes

[1] Habeas Corpus ⇐842

197 —
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k842 Review De Novo.

Court of Appeals reviews de novo district court's dismissal on statute of limitations grounds of habeas corpus petition. 28 U.S.C.A. § 2254.

[2] Habeas Corpus ⇐603

197 —
197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Laches or Delay.

"Properly filed" state habeas corpus petition, within meaning of statute allowing for tolling of Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period while federal habeas corpus petitioner has properly filed

state habeas corpus petitions pending. is petition that has been delivered and accepted in compliance with applicable laws and rules governing filings. 28 U.S.C § 2244(d)(2).

[3] Habeas Corpus ⇐603

197 —

197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Laches or Delay.

Federal habeas corpus petitioners's second round of state habeas corpus petitions was "pending" while petitions were before state courts for decision, and thus, Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period for bringing federal habeas corpus petition was tolled during this time, even though state petitions were ultimately denied on procedural grounds; state courts' ultimate decision on petitions did not affect whether petitions were pending while courts considered them. 28 U.S.C.A. § 2244(d)(2).

[4] Habeas Corpus ⇐603

197 —

197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Laches or Delay.

Federal habeas corpus petitioners's state habeas corpus petition is "pending" before state court, so as to toll Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period for bringing federal habeas corpus petition, while state court considers it, so long as state procedure for filing habeas corpus petition exists; whether state court's ultimate decision is on merits or on procedural grounds does not change petition's pending status. 28 U.S.C.A. § 2244(d)(2).

[5] Habeas Corpus ⇐603

197 —

197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Laches or Delay.

Federal habeas corpus petitioners's first round of state habeas corpus petitions was "pending" during three-year interval between decision of Court of Appeal and decision of California Supreme Court, and thus, Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period for bringing federal habeas corpus petition was tolled during this time, where California Supreme Court summarily denied petition without comment or citation, which is considered to be decision on merits. 28 U.S.C.A. § 2244(d)(2).

[6] Habeas Corpus ⇐603

197 —

197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Laches or Delay.

State habeas corpus petition filed before Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year statute of limitations for bringing federal habeas corpus petition begins to run tolls such limitation period. 28 U.S.C.A. § 2244(d)(2).

[7] Habeas Corpus ⇐603

197 —

197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Laches or Delay.

State habeas corpus petition is considered "pending," so as to toll Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period for bringing federal habeas corpus petition, during one full round of state review. 28 U.S.C.A. § 2244(d)(2).

[8] Habeas Corpus ⇐603

197 —

197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Laches or Delay.

As long as state habeas corpus petitions are properly filed, federal habeas corpus petitioner is entitled to tolling of Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period for bringing federal habeas corpus petition during second or subsequent rounds of state review. 28 U.S.C.A. § 2244(d)(2).

[9] Habeas Corpus ⇐603

197 —

197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Laches or Delay.

Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period for bringing federal habeas corpus petition did not begin to run until day after California Supreme Court's denial of petitioner's first round state habeas corpus petitions became final; such first round state petitions were filed before AEDPA was enacted and AEDPA took effect prior to California Supreme Court's final decision. 28 U.S.C.A. § 2244(d)(2).

[10] Habeas Corpus ⇐603

197 —

197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Laches or Delay.

Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period for bringing federal habeas corpus petition was not tolled during interval between first and second rounds of state habeas corpus petitions. 28 U.S.C.A. § 2244(d)(2).

[11] Habeas Corpus ⇐603

197 —

197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Laches or Delay.

Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period for bringing federal habeas corpus petition was not tolled when petitioner submitted state habeas corpus petition that was deemed not filed because petitioner did not use proper form. 28 U.S.C.A. § 2244(d)(2).

Reginald Chavis, petitioner/appellant in propria persona.

Bill Lockyer, Attorney General of the State of California, and Catherine Chatman, Deputy Attorney General of the State of California, Sacramento, CA, for respondent/appellee Anthony LeMarque.

Appeal from the United States District Court for the Eastern District of California; William B. Shubb, Chief Judge, Presiding. D.C. No. CV-00-02496-WBS/GGH.

Before: B. FLETCHER, TROTT, and FISHER, Circuit Judges.

BETTY B. FLETCHER, Circuit Judge:

In 1991, Reginald Chavis was convicted of attempted first degree murder with the use of a weapon in Sacramento County Superior Court. He unsuccessfully challenged his conviction on direct appeal in California state courts and then filed two rounds of state habeas petitions. All of Chavis's state petitions were denied, and he filed a federal habeas petition on August 30, 2000. The issue before us is

whether Chavis's federal petition was filed within the one-year statute of limitations provid' ' by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). (FN1) The di: ' court dismissed the petition as untimely. We .erse.

I. Background

The timeliness of Chavis's federal petition depends on whether he is entitled to statutory tolling for each of his state habeas petitions. 28 U.S.C. § 2244(d)(2) (allowing tolling for "properly filed" state habeas petitions while such petitions are "pending"). We therefore set forth in detail the procedural history of his case.

A. Conviction and Direct Appeal

On July 29, 1991, a jury convicted Chavis of attempted murder for the shooting of Katrina Haines. Chavis was sentenced to life with the possibility of parole. Chavis appealed the conviction to the California Court of Appeal and California Supreme Court. Both appeals were denied, the latter on October 28, 1992.

B. First Round of State Habeas Petitions

Chavis filed a habeas petition in Sacramento Superior Court on May 14, 1993, which was denied on the merits on July 30, 1993. Chavis filed a substantially similar petition in the California Court of Appeal on August 22, 1994, and that petition was denied on September 29, 1994.

AEDPA and the one-year statute of limitations for federal habeas petitions took effect on April 24, 1996.

On November 5, 1997, the California Supreme Court received Chavis's habeas petition. The Court denied the petition on April 29, 1998, without any comment or case citation. That decision became final on May 29, 1998.

C. Second Round of State Habeas Petitions

Chavis filed a second habeas petition in Superior Court on December 15, 1998. On January 5, 1999, the Superior Court ordered the petition "not filed" because Chavis, a pro se prisoner, had not filled out the habeas form in accordance with court procedures. On January 25, 1999, Chavis refiled his habeas petition with the Superior Court in the proper format, and it was denied on February 24, 1999. The Superior Court held that the successive petition was barred for "procedural reasons" because it was presented in a "piecemeal" manner. *In re Chavis*, No. 99F00573 at *1 (Sacramento Super. Ct., Feb. 24, 1999) (citing *In re Clark*, 5 Cal.4th 750, 774, 21 Cal.Rptr.2d 509, 855 P.2d 729 (1993)). It

also held that th claims were not presented with "due diligence" because seven years passed between Chavis's conviction and the second petition. *Id.* (citing *In re Robbins*, 18 Cal.4th 770, 780, 77 Cal.Rptr.2d 153, 959 P.2d 311 (1998)).

Chavis filed a second petition in the California Supreme Court on December 17, 1999. That petition was summarily denied with citations to *Clark*, 5 Cal.4th 750, 21 Cal.Rptr.2d 509, 855 P.2d 729, *Robbins*, 18 Cal.4th 770, 77 Cal.Rptr.2d 153, 959 P.2d 311, and *Ex parte Dixon*, 41 Cal.2d 756, 759, 264 P.2d 513 (1953). The denial became final on April 28, 2000.

D. Federal Habeas Petition

Chavis filed his federal habeas petition with the district court on August 30, 2000. The magistrate judge made findings and recommendations that Chavis was not entitled to statutory tolling for state habeas petitions filed prior to the enactment of AEDPA, and that because all subsequent state petitions were filed more than one year after AEDPA's active date, Chavis's federal petition was barred. The district court adopted the findings and recommendations in full on September 18, 2001. Chavis appeals. The state concedes that the district court erred in its reasoning, but argues that Chavis is still not entitled to tolling for any of his state petitions.

II. Analysis

[1] We review de novo the district court's dismissal of Chavis's 28 U.S.C. § 2254 petition on statute of limitations grounds. *See Jenkins v. Johnson*, 330 F.3d 1146, 1149 (9th Cir.2003). We first hold that Chavis is entitled to tolling while his second round of state petitions was pending, even though the petitions were denied on procedural grounds, because the state court's ultimate decision on a particular petition does not affect whether that petition is "pending" *while the court considers it.* Second, we hold that Chavis is entitled to tolling for the three-year interval between his first round petitions to the California Court of Appeal and California Supreme Court--an interval during which AEDPA took effect--because the California Supreme Court did not dismiss the petition as untimely but rather decided it on the merits. Finally, we set forth the proper calculation of the periods for which Chavis is entitled to tolling, and conclude that Chavis's federal habeas petition was timely filed.

A. Definition of Pending

[2] 28 U.S.C. § 2244(d)(2) allows t g of the AEDPA statute of limitations while a eral habeas petitioner has "properly filed" state habeas petitions that are "pending." (FN2)

[3] The state contends that under *Carey v. Saffold*, 536 U.S. 214, 219-21, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002), Chavis's second round petitions were never pending in the state courts, even while the courts had the petitions under submission, because the state courts eventually denied the second round petitions for procedural reasons. The state's argument misapprehends Supreme Court precedent and distorts the plain meaning of the word "pending."

The *Saffold* Court did rely on the state court's decision on whether a habeas petition was untimely to determine whether the state petition was pending, but in a different context: the Court was considering whether the word pending in the habeas statute applied to a time gap between the petitioner's habeas petitions in the California Court of Appeal and the California Supreme Court. *Id.* at 217-18, 122 S.Ct. 2134. This was an issue because in California, petitioners file separate writs at each court level instead of appeals, and California uses a "reasonableness" standard rather than a strict time limit to determine whether the next writ was timely filed after the first was denied. *Id.* at 221-22, 122 S.Ct. 2134.

While *Saffold* clearly applies to determine whether a second round habeas petition was pending *between* levels of review, it is not relevant to whether the second round habeas petitions were pending *while the state courts were considering them.* "The dictionary defines 'pending' ... as 'in continuance' or 'not yet decided.' " *Id.* at 219, 122 S.Ct. 2134 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1669 (1993)). A petition is clearly pending after it is filed with a state court, but before that court grants or denies the petition.

[4] Under the state's strained definition of "pending," a habeas petitioner would not know whether he was entitled to tolling for a petition filed in state court until the court granted or denied his petition. In the meantime, the AEDPA statute would be running and often would expire before the state court decided the case. So long as a state procedure for filing the habeas petition exists, the petition is pending while the state court considers it, whether the decision is ultimately on the merits or on procedural grounds. *See Jenkins*, 330 F.3d at 1153 (citing *Nino v. Galaza*, 183 F.3d 1003, 1005 (9th Cir.1999)). Chavis's second round habeas petitions were pending while they were properly before the California courts for decision. (FN3)

B. Reasonableness of Delay Between First Round Petitions

[5] The state also argues that the three-year delay between Chavis's first round California Court of Appeal and Supreme Court petitions was unreasonable, and therefore cannot be tolled. In contrast to the issue of what is "pending," this is an appropriate situation in which to apply *Carey v. Saffold*, because we must decide whether Chavis had a pending petition during "intervals between a lower court decision and a filing of a new petition in a higher court." *Saffold*, 536 U.S. at 222, 122 S.Ct. 2134. The *Saffold* Court held that a petition is considered pending during such intervals unless the petitioner unreasonably delayed filing a new petition at a higher level. *Id.* at 223, 225, 122 S.Ct. 2134. The Court then remanded for us to decide whether Saffold had unreasonably delayed. *Id.* at 226, 122 S.Ct. 2134. On remand, we held that because the California Supreme Court did not deny Saffold's petition as untimely, but rather on the merits and for lack of diligence in filing his initial petition, the delay in filing the California Supreme Court petition was not unreasonable. *Saffold v. Carey*, 312 F.3d 1031, 1035-36 (9th Cir.2002).

The state argues that we must determine the reasonableness of the three-year delay during Chavis's first round of state

petitions, looking to state law. However, we rejected that approach on remand in *Saffold*, and held that the relevant inquiry is whether the state court denied the petition as untimely. *Id.* at 1034-36.

Under our decision in *Saffold*, because Chavis's November 1997 habeas petition to the California Supreme Court was denied on the merits, it was pending during the interval between the Court of Appeal decision and the Supreme Court petition and he is entitled to tolling. *See id.* When the California Supreme Court denies a habeas petition without comment or citation, we have long treated the denial as a decision on the merits. *Hunter v. Aispuro*, 982 F.2d 344, 348 (9th Cir.1992) (9th Cir.1992). Therefore, the California Supreme Court's summary denial was on the merits, and the petition was not dismissed as untimely. *See id.; see also Delhomme v. Ramirez*, 340 F.3d 817, 819, 820 n. 2 (9th Cir.2003) (noting that there was no indication that a state habeas petition was untimely where the California Supreme Court denied the petition without comment or citation). As a result, Chavis is entitled to tolling during his first round of state petitions. (FN4)

C. Chavis's Federal Habeas Petition Was Timely Filed

[6] We set forth in this section the proper calculation of the time periods for which Chavis was entitled to tolling, when he had properly filed state petitions pending. *See* 28 U.S.C. § 2244(d)(2). The district court dismissed the petition as untimely because it held that Chavis's first state habeas petitions, filed in 1993 and 1994, did not toll the one-year statute, since AEDPA was not enacted until 1996.

The District court erred. (FN5) A "state habeas petition filed *before* the AEDPA statute of limitations begins to run tolls the limitation period." *Jiminez v. Rice*, 276 F.3d 478, (9th Cir.2001) (citing *Tillema v. Long*, 253 F. 494 (9th Cir.2001)).

[7][8] A habeas petition is considered pending during one full round of state review, which in California includes petitions filed in Superior Court, the Court of Appeal, and the Supreme Court. *Nino*, 183 F.3d at 1005-06. As long as the petitions are properly filed, a habeas petitioner is also entitled to tolling during subsequent rounds of state review. *See King v. Roe*, 340 F.3d 821, 823 (9th Cir.2003) (per curiam) (recognizing that a habeas petitioner may be entitled to tolling during a second round of petitions, but holding that the statute is not tolled between rounds); *Dils v. Small*, 260 F.3d 984, 985-86 (9th Cir.2001) (noting that petitioner was entitled to tolling during first, second, and third rounds of state habeas petitions but not between rounds); *see also Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir.1998) ("[I]f a state allows petitioners to file second or subsequent petitions for post-conviction relief, federal courts should not undermine the state's decision by refusing to toll the one-year period of limitation of § 2244(d)(1) where a second or subsequent petition is pending in the state court system.").

[9] Chavis filed a first round of state habeas petitions in the Superior Court in 1993, the Court of Appeal in 1994, and the

California Supreme Court in 1997. Although AEDPA took effect on April 24, 1996, Chavis is entitled to tolling for the entire first round of state petitions, which he began before AEDPA was enacted. Therefore, the one-year statute of limitations under AEDPA did not begin running until the day after California Supreme Court's denial of Chavis's habeas petition became final on May 29, 1998. *See Smith v. Duncan*, 297 F.3d 809, 814 (9th Cir.2002) (noting that the California Rules of Court provide that a California Supreme Court judgment becomes final thirty days after it is issued and holding that the federal statute begins running the day after the state judgment becomes final).

[10][11] The statute was not tolled during the interval between the first and second rounds of Chavis's state petitions. *See Biggs v. Duncan*, 339 F.3d 1045, 1048 (9th Cir.2003). Nor was it tolled when Chavis submitted a petition on December 15, 1998 that was deemed "not filed" because Chavis did not use the proper form. *See Artuz v. Bennett*, 531 U.S. 4, 8, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000) (holding that a state habeas petition is " 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings") (quoting 28 U.S.C. § 2244(d)(2)); *see also Smith*, 297 F.3d at 812. Therefore, Chavis's petition was not tolled between May 29, 1998 and January 25, 1999, a period of 240 days. (FN6)

Tolling recommenced on January 25, 1999, when Chavis properly filed his Superior Court petition and started a second round of state habeas petitions. *See Smith*, 297 F.3d at 812 (holding that petition was "properly filed" even though the state court denied it as procedurally barred because the petition was delivered to and accepted by the state court).

The statute was again tolled during the second round of petitions, from the proper filing in Superior Court on January 25, 1999, until April 28, 2000, the date the California Supreme Court's denial of Chavis's second petition became final. *See id.* Chavis filed a federal habeas petition on August 30, 2000, which was 123 days after the final denial of his last state petition. Chavis's federal petition was close to the deadline, but timely: there are only 363 days that were not tolled, so his petition was filed within the one-year statute of limitations.

III. Conclusion

Chavis is entitled to tolling of the federal statute of limitations for the time during his first and second rounds of state habeas petitions but not between the two rounds. We reverse the district court's dismissal of Chavis's federal petition as untimely and remand for the district court to consider the merits of Chavis's petition.

REVERSED and REMANDED.

(FN*) Anthony LeMarque has replaced Sylvia Garcia as the warden of the Salinas Valley State Prison.

(FN**) This panel unanimously finds this case suitable for decision without oral argument. See Fed. R.App. P. 34(a)(2).

(FN1.) AEDPA's one year statute of limitations applies because Chavis filed his federal habeas petition after AEDPA's effective date, which was April 24, 1996. *See Patterson v. Stewart*, 251 F.3d 1243, 1245 (9th Cir.2001).

(FN2.) A "properly filed" petition is one that has been "delivered and accepted in compliance with 'the applicable laws and rules governing filings.' " *Smith v. Duncan*, 297 F.3d 809, 812 (9th Cir.2002) (quoting *Dictado v. Ducharme*, 244 F.3d 724, 726-27 (9th Cir.2001)). The government only argues that one of Chavis's filings was improperly filed--the November 15, 1998 filing in Sacramento County Superior Court--and we discuss that filing *infra* at section II.C.

(FN3.) The state does not argue that Chavis delayed unreasonably before filing his second round petition with the California Supreme Court after his second round Superior Court petition was denied. He is therefore entitled to tolling during the entire round.

(FN4.) We note, as have other courts, that habeas petitioners should take care to avoid delays between state petitions. "Should the state courts wish (as will usually be the case) to deny such tardily-filed petitions on timeliness grounds, prisoners will find that the door to the federal courthouse is closed as well." *Romero v. Roe*, 130 F.Supp.2d 1148, 1151, (C.D.Cal.2001) ("Romero got lucky. The California Supreme Court denied his ... petition on the merits.").

(FN5.) The state concedes that this holding was error.

(FN6.) The state's brief contains a miscalculation of this period: it states that there are 271 days rather than 240 days between May 29, 1998 and January 25, 1999.

APPENDIX-B

Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See In re Swain (1949) 34 Cal.2d.300,304)

Appointed appellate counsel on direct appeal failed to raise these claims. Petitioner was indigent and a layperson of the law. At the time of commitment petitioner had only a tenth grade education (see probation report ct ___) and was therefore unable to identify these complex errors of State and Constitutional "Law." Petitioner has earned General Education Degree (exhibit 3 attached). By effort, individually, to extend education petitioner identified these claims as a layperson.

Petitioner was also constructively denied access to the courts by the institution to which petitioner is confined. (See exhibit 4 ;attached)

In good faith and in the exercise of sound judgement Petitioner presents these claims to insure the lower court's have been afforded fair opportunity to review these Constitutional claims.

VERIFICATION

(C.C.P. §§ 446, 2015.5; 28 U.S.C. § 1746)

I, Reginald Chavis, declare under penalty of perjury that:

I am the Respondent in the attached matter; I have read the foregoing document(s) and know the contents thereof; that the same is true and correct of my own knowledge, and if called to testify to the contents thereof, I could do so competently as a sworn witness.

Executed this 24th day of February, 2005, at the Salinas Valley State Prison, Soledad, California 93960-1050.

Reginald Chavis
Declarant

.....

DECLARATION OF SERVICE BY MAIL

(C.C.P. §§ 446, 2015.5; 28 U.S.C. § 1746)

I, Reginald Chavis, declare: That I am a resident of Salinas Valley State Prison, Soledad, California; I am over the age of 18 years; that [☒ I am/ ☐ I am not] a party to the above entitled action; that I served a true copy of the document(s) entitled: Respondent's OPPOSITION OF WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

on the below listed person(s)/party(s) by placing a true copy of said document(s) into a sealed envelope with the appropriate postage affixed thereto, and delivering said envelope to prison staff for mailing by the process provided for at the Salinas Valley State Prison, Soledad, California, addressed as follows:

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
1 FIRST STREET N.E.
WASHINGTON, DC
20543 - 0001

ATTORNEY GENERALS OFFICE
C/O CATHERINE CHATMAN
1300 I - STREET
P.O BOX 944255
SACRAMENTO, CA 94244-2550

I declare under penalty of perjury that the foregoing is true correct of my own knowledge; executed this 24th day of February, 2005, at Salinas Valley State Prison, Soledad, California 93960-1050.

Reginald Chavis
Declarant

5

COPY

No. 04-721

Supreme Court, U.S.
FILED
JUL 15 2005
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

MIKE EVANS, Warden, *Petitioner,*

v.

REGINALD CHAVIS, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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*Counsel of Record

PETITION FOR CERTIORARI FILED NOVEMBER 22, 2004
CERTIORARI GRANTED MAY 2, 2005

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The Warden's March 22, 2001 Respondent's Reply to Petitioner's Opposition to Respondent's Motion to Dismiss petition for writ of habeas corpus, filed in United States District Court, Case Number 00-2496 66-97

NOTATION REGARDING LOCATION OF MATERIALS

The following court documents have been omitted in printing this joint appendix because they appear in the appendices to the Petition for Certiorari as follows:

	Appendix
First page of Chavis's November 10, 1997, petition for writ of habeas corpus, reflecting the date filed in the California Supreme Court	F
Findings and Recommendations filed on July 9, 2001, in the United States District Court for the Eastern District	D
Court Order filed on September 20, 2001, in the United States District Court for the Eastern District	C
Opinion in Chavis v. LeMarque, United States Court of Appeals for the Ninth Circuit, Case Number 01-17072 (August 27, 2004), reported at 382 F.3d 921	A
Court Order filed on September 14, 2004, in the United States Court of Appeals for the Ninth Circuit	B

CHRONOLOGICAL LIST OF RELEVANT STATE COURT DOCKET ENTRIES

July 29, 1991	Chavis found guilty by jury of attempted murder and mayhem with related findings of firearm use and great bodily injury in Sacramento County Superior Court in case number CR104529
September 6, 1991	Sacramento County Superior Court sentenced Chavis to state prison for an indeterminate term of life with the possibility of parole
July 30, 1992	California Court of Appeal, Third Appellate District, affirmed the judgment against Chavis in case number C011920
September 4, 1992	Chavis filed a petition for review with the California Supreme Court in case number S028560
October 28, 1992	California Supreme Court denied Chavis's petition for review
May 14, 1993	Chavis filed a petition for writ of habeas corpus in Sacramento County Superior Court in case number 93F04032
July 30, 1993	Sacramento County Superior Court denied the petition in case number 93F04032

August 22, 1994	Chavis filed a petition for writ of habeas corpus in the California Court of Appeal, Third Appellate District in case number C019058
September 29, 1994	Court of Appeal denied the petition in case number C019058
November 10, 1997	Chavis filed a petition for writ of habeas corpus in the California Supreme Court in case number S065691
April 29, 1998	California Supreme Court denied the petition in case number S065691
December 15, 1998	Chavis submitted a petition for writ of habeas corpus in Sacramento County Superior Court in case number 98F10793
January 5, 1999	Sacramento County Superior Court ordered the petition in case number 98F10793 "not filed"
January 25, 1999	Chavis filed a petition for writ of habeas corpus in Sacramento County Superior Court in case number 99F00573
February 24, 1999	Sacramento County Superior Court denied the petition in case number 99F00573
December 17, 1999	Chavis filed a petition for writ of habeas corpus in the California Supreme Court in case number S084374

March 29, 2000	California Supreme Court denied the petition in case number S084374

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES FOR UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF CALIFORNIA CASE NUMBER CIV S-00-2496

August 30, 2000	Chavis filed a petition for writ of habeas corpus
February 13, 2001	Respondent, Warden Sylvia Garcia filed a motion to dismiss the petition for writ of habeas corpus
March 7, 2001	Petitioner's Opposition to Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus filed by Chavis
March 22, 2001	Respondent's Reply to Petitioner's Opposition to Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus filed by the Warden
July 9, 2001	The Magistrate Judge filed findings and recommendations, recommending that the motion to dismiss be granted and the action dismissed
September 20, 2001	District Court Judge issued order adopting the findings and recommendations, granting the motion to dismiss the petition, and dismissing the case
October 1, 2001	Chavis filed a notice of appeal
October 17, 2001	District Court Judge issued order denying certificate of appealability

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES FOR UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CASE NUMBER 01-17072

October 23, 2001	Chavis filed a request for a certificate of appealability
April 17, 2002	Request for a certificate of appealability granted by the Ninth Circuit
August 27, 2004	Ninth Circuit filed opinion and entry of judgment reversing the district court and remanding
September 14, 2004	Appellee Warden's motion for a stay of the mandate granted

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE & TIME: 7/30/93 DEPT. NO.: 5
JUDGE : KENNETH G. PETERSON
CLERK : K. NUSSBAUM
REPORTER : BAILIFF :

IN THE MATTER OF
REGINALD A. CHAVIS CASE #93F04032

NATURE OF PROCEEDINGS: PETITION FOR WRIT OF HABEAS CORPUS - **ORDER**

The petition for writ of habeas corpus has been filed and considered.

IT IS ORDERED that the petition for writ of habeas corpus is DENIED.

Petitioner, an inmate at Folsom Prison, alleges that he was wrongly convicted of attempted first degree murder in Sacramento County Superior Court case number 104529. In 1991, both he and a co-defendant, Rick Johnson, were convicted and sentenced to life with a possibility of parole. He has set forth four grounds for habeas corpus relief which are related to his criminal proceeding.

Petitioner first contends that he received ineffective assistance of counsel during his trial. Second, he asserts that the trial court abused its discretion by allowing the prosecution to argue an improper motive for the offense. Third, he maintains that the prosecution used false and perjurious testimony. He claims that the prosecution knew that the testimony of the victim, Rhonda Haines, was false, and failed to inform the trial court of it. Finally, he states that there was insufficient evidence to support his conviction.

Petitioner has failed to plead a prima facie case for relief in support of any of these claims. (In re Bower (1985) 38 Cal.3d 865, 872.) The Court, therefore, denies the petition. Petitioner's four claims are addressed within the following two subsections.

A. Petitioner Has Failed to Plead a Prima Facie Case of Ineffective Assistance of Counsel.

Generally, petitioner first alleges that his attorney failed to investigate potentially meritorious defenses. He further alleges that his attorney failed to call witnesses who could have provided exculpatory evidence.

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1. Petitioner's Attorney Did Not Render Ineffective Assistance of Counsel by Failing to Investigate the Alleged Statements of Eldra Jackson III.

Petitioner asserts that his attorney failed to investigate the statements of Eldra Jackson III. Jackson informed petitioner that he had accompanied the victim, Rhonda Haines, during transport to the courthouse. He was also kept in the same holding cell with her. She told him that she was falsely stating that petitioner was her assailant. She also told him that she wanted to put it all on petitioner, and hoped that the co-defendant got off. Petitioner told his attorney about Jackson's statements, but the attorney refused to investigate it.

Petitioner has failed to establish a prima facie case of ineffective assistance of counsel in regard to this claim. In Strickland v. Washington (1984) 466 U. S. 668, the United

States Supreme Court set forth the standard for evaluating claims of ineffective assistance of counsel. For purposes of a habeas corpus pleading, a petitioner must establish a prima facie case that:

1. counsel's performance was deficient; and

2. petitioner ' s defense was prejudiced by the performance.

(Strickland v. Washington, supra, at 687.)

Petitioner has failed to satisfy either one of these requirements. The Court is skeptical of his factual allegations regarding Jackson's statements. After his conviction, he requested that the trial court permit him to represent himself because his attorney had rendered ineffective assistance of counsel. He made no reference to Jackson or his attorney's failure to investigate Jackson's possibly exonerating testimony. (See the transcript of petitioner's Faretta-Marsden hearing, dated September 4, 1991, currently under seal with the Third District Court of Appeal.) His failure to present this claim at his post-trial Faretta-Marsden motion hearing suggests that he has subsequently manufactured it.

Furthermore, petitioner has not provided any statement or declaration executed by Jackson. Jackson was a male inmate while Haines was a female one. It seems implausible that law enforcement would transport male and female inmates together from the jail to the courthouse. It seems equally

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implausible that it would house them in the same holding cell pending their hearings.

Even if petitioner did inform his attorney of Jackson's statements, his attorney did not render ineffective assistance of counsel by failing to investigate them. His attorney cannot be said to have been deficient for failing to further investigate such an unlikely story. The Court therefore finds this argument in support of his ineffective assistance of counsel claim unpersuasive.

2. Petitioner's Attorney Did Not Render Ineffective Assistance of Counsel by Failing to Challenge the Credibility of Haines in the Manner Petitioner Suggested.

Petitioner further alleges that his attorney failed to cross-examine Rhonda Haines about her contradictory statements concerning the offense. At the preliminary hearing, an officer related from a police report that she stated that petitioner shot her with a handgun. She additionally stated that the co-defendant shot her with a shotgun. At trial, Haines testified that petitioner shot her with a shotgun. She stated that the codefendant did not shoot her or make any threatening statements. Petitioner contends that his attorney should have confronted her about these false statements.

Petitioner contends that Haines was attempting to exonerate the co-defendant and implicate petitioner as Jackson had told him. Petitioner has attached copies of pages of two police reports to the petition. They record interviews of her conducted by Detective Edwards on March 12, 1991, and March 14, 1991, two and four days after the incident. (See Exhibits B and C, attached to the petition.) In each of them, Edwards stated that she said that she was shot by someone named "Rick" or "Mike Hayes" as well as "Reggie Taylor". Apparently, "Mike Hayes"

is an alias of the co-defendant while "Reggie Taylor" is an alias of petitioner. Haines testified that she did not know the defendant by the name of "Mike Hayes". (See RT 280 of the trial transcript, attached to the petition.) Again, petitioner contends that his attorney would have challenged her credibility on this issue. His attorney did not do so.

Petitioner states that his defense was based upon two theories: (1) alibi; and (2) the victim, Haines, was lying. In support of his defense, there was evidence that she was coherent when she initially told a paramedic that she had been shot by "A. J." and "Rick Hammit". A

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reasonably competent attorney would have emphasized this evidence, but his attorney did not. It would have refuted the prosecution's claim that the paramedic misunderstood what Haines actually said.

As already noted, Haines spoke with Detective Edwards two days after the incident on March 12, 1991. Petitioner asserts that she attempted to implicate him by providing a false statement. She stated that all three of them, petitioner, the co-defendant and herself, stopped at the residence of Glenda Williams. They learned about a police investigation. Petitioner and the co-defendant then "took off". (See Exhibit E, attached to the petition.)

Petitioner states that Haines recanted these statements when she testified after Williams stated to the contrary. He asserts that she made up the episode concerning the money orders to establish his motive for the crime. He maintains that he did not

see her again after dropping her at Williams' residence. His attorney failed to impeach Haines in regard to this issue. Petitioner states that he might have been acquitted if his attorney had done so.

The Court also finds these arguments in support of petitioner's ineffective assistance of counsel claim unpersuasive. He raised these issues in a post-trial Faretta-Marsden hearing on September 4, 1991. His attorney stated the inconsistencies were irrelevant. First, he said that petitioner's defense was that he was not at the crime scene. Any inconsistencies related to whether petitioner or the co-defendant shot Haines were not pertinent. Second, Haines made many of her statements while under deep medication. There was, therefore, a rational explanation for any inconsistent statements that she provided during this period. Judge Tochterman ruled that petitioner's complaints about the adequacy of his representation were frivolous. Petitioner's problem was that Haines was a very credible witness whom the jury believed. (926, 927.)

Petitioner's allegations do not satisfy the ineffective assistance of counsel standard set forth in the Strickland decision. In Strickland, the court noted that counsel is granted wide latitude in making tactical decisions. There is a presumption that a challenged tactical decision is considered sound trial strategy. Strategic choices made after a thorough investigation of the law and facts are virtually unassailable. (Strickland, supra, at pp. 689, 690.)

In this case, petitioner's attorney provided logical reasons for refusing to challenge the credibility of Haines in the manner petitioner suggested. Some of his suggested inconsistencies were incompatible with his alibi defense. Others were effectively explainable because Haines was

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heavily medicated when she made the statements. His attorney, therefore, made informed strategic choices which cannot be subsequently challenged as evidence of ineffective assistance of counsel.

3. Petitioner's Attorney Did Not Render Ineffective Assistance of Counsel by Failing to Request a Limiting Instruction.

Finally, petitioner alleges that the prosecution introduced evidence of drug trafficking by the co-defendant and Rhonda Haines. His attorney failed to make a limiting instruction despite a complete lack of evidence connecting him to such activity. In fact, the trial court admitted the evidence in such a manner so as to preclude the issuance of any such instruction. His allegation arises from an error contained in his appellate decision. The Court finds, however, that a petition for writ of habeas corpus is not the appropriate means for addressing this problem.

In its decision, the Third District Court of Appeal stated that the drug trafficking evidence only applied to the co-defendant. Petitioner's attorney could only request a limiting instruction under such circumstances. (See pp. 19 and 20 of the Third District Court of Appeal's decision, dated July 30, 1992.) But at trial, however, the trial judge, Judge Tochterman, explicitly permitted the prosecution to introduce such evidence for the purpose of establishing a motive for both petitioner and the co-defendant. (See RT 214-228, 232, 233, 236, 242-245 of the trial transcript, attached to the petition.)

The trial court specifically permitted the prosecution to introduce the following evidence of the drug transaction: After leaving Williams' residence, Haines found both petitioner and the co-defendant at a friend's apartment. The co-defendant said he did not have time to talk to her because he and petitioner were "going to take care of business." They left, and later returned with a long rifle. The prosecution introduced evidence of prior episodes of drug dealing involving Haines and the co-defendant to support an inference that both petitioner and the co-defendant left to transact a deal. (See pp. 2 and 3 of the appellate decision in this proceeding.)

Petitioner and the co-defendant planned to go to Stockton, and Haines pleaded to go with them. They relented. Petitioner began to accuse her of cooperating with the police. Both stated that they did not intend to go to jail "behind that bitch". Petitioner shot her after the co-defendant was unable to do so.

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Judge Tochterman provided the following reasons for permitting the prosecution to introduce evidence of prior drug dealing: (1) Petitioner and the co-defendant said that they were leaving to take care of business when they left Haines for about a half hour; (2) They refused to permit her to accompany them; and (3) Subsequent statements of the petitioner and the co-defendant about not being jailed because of Haines suggested that they believed that she could provide evidence of their drug dealing to the police. (See RT 242-245 of the trial transcript, attached to the petition.)

Based upon the foregoing factual summary, the Court must deny petitioner's claim regarding his attorney's alleged

ineffective assistance of counsel for failing to request the limiting instruction. It is evident that the trial court would have denied any such request. An examination of the trial transcript indicates that Judge Tochterman permitted the prosecution to introduce the evidence expressly for the purpose of showing petitioner's motive.

Petitioner's current claim is, therefore, the inevitable consequence of the appellate court's misreading of the record. His attorney could not seek a limiting instruction because Judge Tochterman explicitly permitted the introduction of the evidence to show his motive. He cannot, however, seek to confront this problem by means of a petition for writ of habeas corpus. His appellate counsel filed a petition for review with the California Supreme Court which was denied on October 28, 1992. His attorney should have addressed this issue in that pleading if he did not do so. Petitioner cannot utilize a petition for writ of habeas corpus as a second appeal regarding it. (In re Terry (1971) 4 Cal.3d 911, 927.)

B. Petitioner Has Also Failed to Plead a Prima Facie Case for Relief in Support of His Remaining Three Claims.

Petitioner has presented three additional claims for habeas corpus relief. First, he asserts that the trial court abused its discretion by allowing the prosecution to argue an improper motive for the offense. Second, he maintains that the prosecution used false and perjurious testimony. He claims that the prosecution knew that Rhonda Haines' testimony was false, and failed to inform the court of it. Finally, he states that there was insufficient evidence to support his conviction.

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The Court denies all three of these claims. In regard to his first claim, he contends that the trial court improperly permitted the prosecution to argue that he shot Haines because he feared being arrested for drug dealing. The Court denies this claim because petitioner had the opportunity to raise this issue on appeal. A petition for writ of habeas corpus should not be used as a second appeal. (Terry, supra; In re Walker (1974) 10 Cal.3d 764, 773.)

In regard to his second claim, petitioner contends that the prosecution introduced false and perjurious testimony against him at trial. He asserts that Haines provided false testimony about his participation in the shooting. He further asserts that the prosecution presented her testimony with knowledge of its falsity.

The Court must also deny this claim. Petitioner has not established that Haines' testimony was false. Nor has he established that the prosecution knew of its falsity. He must establish both before he has established a prima facie case of this type of prosecutorial misconduct. (Napue v. Illinois (1959) 360 U. S. 264, 269; Brown v. Wainwright (11th Cir. 1986) 785 F.2d 1457, 1464-1466.) He has merely recited the inconsistencies in Haines' statements about the offense that he presented in regard to his ineffective assistance of counsel claim. Her inconsistent statements do not necessarily indicate that she provided false testimony. After the trial, Judge Tochterman stated that she was a credible witness.

Finally, petitioner contends that the prosecution introduced insufficient evidence to support his conviction. He states that his conviction was based upon the perjurious testimony of Haines. The Court denies this last claim for habeas corpus relief. As already noted herein, he has failed to establish that

Haines provided false testimony. Furthermore, he should have instead pursued this claim on appeal. Again, a petition for writ of habeas corpus should not be used as a second appeal. (Terry, supra; In re Walker (1974) 10 Cal.3d 764, 773.)

DATED: July 30, 1993

CC: Reginald A. Chavis, H08159
FOLSOM STATE PRISON
PO BOX 29
REPRESA, CA 95671

/s/
JUDGE OF THE SUPERIOR COURT

BOOK:
PAGE :
DATE:
CASE NO. : 93F04032
CASE TITLE:
DISTRIB. :
re:kmr

SACRAMENTO SUPERIOR COURT

BY /s/
Deputy Clerk

FILED
SEP 29 1994
Court of Appeal-Third District
Robert L. Liston, Clerk
By _____/s/_____ Deputy

**IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT**

IN RE REGINALD CHAVIS, ON HABEAS CORPUS
Petitioner

3 Crim. C019058
Sacramento

By the Court:

The petition for writ of habeas corpus is denied.

Dated: September 29, 1994

/s/
PUGLIA, P.J.

---

cc: See Mailing List

Selected Pages of Chavis's November 10, 1997 Petition for Writ of Certiorari and Attached Exhibits, Filed in the California Supreme Court, Case Number S065691

12. Other than direct appeal, have you previously filed any petitions, applications, or motions with respect to this conviction, commitment, or issue in any court?

__X__ Yes. If yes, continue with number 13.

_____ No. If no, skip to number 15.

13. (1) Name of court Superior Court of the State of California

Nature of proceeding (for example, "habeas corpus petition") Habeas corpus petition

Issues raised: a. Ineffective assistance of counsel
b. Abuse of discretion
c. Prosecutorial exploitation of perjury
d. Insufficient evidence

Result (*Attach order, if available*) denied (attached)
Date of decision July 30, 1993

(2) Name of court Court of Appeals Of The State Of California (Third Appellate District)

Nature of proceeding Habeas Corpus Petition

Issues raised: a. Erroneous Denial of Severance
b. Exclusion of relevant evidence
c. Ineffective assistance of counsel
d. Prosecutorial misconduct
e. Insufficient evidence

f. Ineffective assistance - Appellate Counsel

Result (*Attach order, if available*) denied; attached
Date of decision September 29, 1994

For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result.

N/A

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

Your petitioner is a layman of law and was illegally and actively being denied access to the court by the prison petitioner is confined. Your petitioner was granted an intrainstitutional appeal to attain access to the court. (See Exhibit 1)

16. Are you presently represented by counsel?

____ Yes. __X__ No. If yes, state the attorney's name and address, if known.

Your petitioner is in propria persona

17. Do you have any petition, appeal, or other matter pending in any court?

____ Yes. __X__ No. *If yes, explain.*

N/A

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court.

N/A

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: /s/
(Signature of Petitioner)

EXHIBIT 1

SUPPLEMENT PAGE

RE: California State Prison-Sacramento (SAC)
Second Level Reviewer's Response
Appeal Log #: SAC-C-95-03353
Date: February 8, 1996

/s/
Inmate: Chavis, H-085159 FEB 16 1996

APPEAL ISSUE: (Modified)
Legal

APPEAL DECISION:

PARTIALLY GRANTED (MODIFICATION ORDER)

APPEAL RESPONSE

K. L. Markey, Appeals Coordinator, was assigned to investigate your appeal at the Second Level of Review.

All submitted documentation and supporting arguments have been considered, including the interview conducted at the First Level of Review (FLR). Additionally, a thorough investigation has been conducted regarding the claim presented by you and evaluated in accordance with SAC's Operational Procedures (OP's) and the California Code of / Regulations (CCR), Title 15.

SUMMARY OF APPEAL

You contend that you wish to utilize Excused Time Off (ETO) to go to the Law Library, or you wish to receive a job change to a Third Watch position in order to accommodate your Law Library access.

SUMMARY OF INVESTIGATION

The Department's rule regarding use of ETO is contained in the California Code of Regulations (CCR), Title 15, Section 3045.2.

The First Level Reviewer has informed you that the use of ETO does not include an inmate's desire to utilize the Law Library. However, you will be referred to the Unit Classification Committee (UCC) who shall review your job assignment, and make a determination concerning your placement in a Third Watch work position.

CALIFORNIA STATE PRISON - SACRAMENTO
APPEAL LOG # SAC-C-95-03353
CHAVIS, H-08159
February 8, 1996
Page 2

APPEAL RESPONSE

For the reasons cited above, your appeal is **PARTIALLY GRANTED**. The Appeal's Office will prepare a **MODIFICATION ORDER** instructing the C-Facility Captain to have you appear before the Unit Classification Committee (UCC). UCC will determine whether you can be assigned to a Third Watch work position to accommodate your needs for use of the Law Library.

/s/
THEO WHITE
Warden

TW:km
cc: Inmate Appeals Unit
Central File

State of California Department of Corrections

INMATE/PAROLEE
APPEAL FORM
CDC 802 (12/87)

Location:	Institution/Parole Region	Log No.	Category
1.	CSP-SAC	1. 95-03353	10
2.	Sac-C	2.	Library access-ETO

You may appeal any policy, action or decision which has a significant adverse affect upon you. With the exception of Serious CDC 115s, classification committee actions, and classification and staff representative decisions, you must first informally seek relief through discussion with the appropriate staff member, who will sign your form and state what action was taken. If you are not then satisfied, you may send your appeal with all the supporting documents and not more than one additional page of comments to the Appeals Coordinator within 15 days of the action taken. No reprisals will be taken for using the appeals procedure responsibly.

NAME	NUMBER	ASSIGNMENT	UNIT/ROOM NUMBER
Chavis	H-08159	PTR.060	C 7115

A. Describe Problem: This inmate is assigned to the above stated position as a seven block (tier tender), with stipulated RDO's being Sun/Mon. I am currently without a hired attorney but, I work pro-per on my criminal case and I am in the process of attempting to pursue a filing of a habeas corpus petition on my criminal conviction. In order to complete my petition it is necessary for me to get into C-facility's law library to research and obtain the required law, points and authorities to validate my filing. My problem is that the law library is closed on Sun/Mon, which, (refer to attachment)

If you need more space, attach one additional sheet.

B. Action Requested: That I be granted use of excused time off in accord to Section 3045.2 (2)(G)(5) of the Title 15, in two hour increments 5 days weekly after finishing my assigned duties, to have reasonable access to the law library as soon as possible.

Inmate/Parolee Signature: /s/ H-08159
Date Submitted: 12-12-95

C. INFORMAL LEVEL (Date Received:_____)
Staff Response: See attached

Staff Signature: See attached
Date Returned to Inmate: _____

D. FORMAL LEVEL
If you are dissatisfied, explain below, attach supporting documents (Completed CDC 115, Investigator's Report, Classification chrono, CDC 128, etc.) and submit to the Institution/Parole Region Appeals Coordinator for processing within 15 days of receipt of response.

My superior says that he can't grant me ETO. However, in accord to 3045.2 (2)(G)(5) the lieutenant or high authority can do so. Please do so, so that I may continue good programming as per CDC's expectations for me to work an assignment. A-1-A unassign me or change me to a PM assignment A.S.A.P. Thank-you.

Signature: /s/ H-08159
Dated Submitted: 12-19-95

Note: Property/Funds appeals must be accompanied by a completed Board of Control form BC-TE, Inmate Claim

RECEIVED
DEC 22 1995
CSP-SAC

Inmate Appeal Continued

incidently are also my assigned RDO's. The library closes at about 1:45 p.m. during it's open days of the week, and this inmate is not permitted to be relieved from duty until 1:30 p.m. I have no reasonable access to the law library. I have discussed this problem with c/o Fender who supervises me, and he advises me that he can not relieve me from duty to go to the library regardless of the circumstances.

I asked that I be granted use of (ETO) in accord to section 3045.2 (2)(G)(5) of the title 15, which indicates that (ETO) may be used for "non-routine recreation and entertainment activities" and c/o Fender denied me that request.

This inmate can not get a PLU status without filing the proper documents to the court and, I can not file the proper documents to the court without reasonable access to the law library for required case law, points and authorities.

I have tried to convieniently resolve this situation in several ways before taking this action:

(1) I have asked and talked to c/o Fender, my supervisor.

(2) I have written the law librarian and asked for PLU status as a result of my sitution, to which I never received a response.

(3) I also submitted a Job Change application which was approved over a month ago but never occurred for reasons unknown.

To Second Level

My supervisor says that he can not grant me ETO for use of the access to law library however, in accord to the above cited title 15 section the lieutenant and higher authority can. I would request that it be granted of me so that I can get my legal business handled and still conform to CDC's programming of continuing to work my assignment. If I can not be granted ETO, please unassign me from this position to A-1-A unassigned or change me to a

State of California

MEMORANDUM

Date: January 12, 1996

To: Inmate Chavis (H-08159)

From: California State Prison-Sacramento, Represa 95671

Subject: APPEAL LOG # SAC-C-95-03353 (FIRST LEVEL RESPONSE)

SUMMARY OF APPEAL

You wish to utilize the services of the C Facility Legal Library. Unfortunately, the library hours of operation coincide with your assigned work hours. You are requesting use of ETO time during your work hours to go to the library.

SUMMARY OF INVESTIGATION

On January 12, 1996, you were interviewed and an investigation was conducted by this writer regarding the above-noted appeal. During my investigation I found that use of ETO time is not an option for you in this circumstance. California Code of Regulations, Title 15, Section #3045.2 specifies authorized use of ETO time. Access to the Legal Library is not listed, nor is it considered a "non-routine recreation and entertainment" activity, as you suggest.

You best option at this point is to request a work assignment change that would allow access to the Legal Library as a GLU.

APPEAL RESPONSE

For the reasons cited above your appeal is DENIED.

/s/
B. MCJUNKIN
Program Sergeant, 2/W
C Facility

BM:lj

RECEIVED
JAN 17 1996
CSP-SAC
APPEALS OFFICE

State of California

MEMORANDUM

FORMAL RESPONDENT c/o Fender

Date: 12-13-95

To: Inmate Chavis H-08159
(NAME) (CDC#)

From: California State Prison-Sacramento, Represa 95671

Subject: INFORMAL LEVEL APPEAL
UNIT LOG # 1295 C-921

Appeal is (indicate one) GRANTED / PARTIALLY GRANTED / **DENIED** / OTHER

On 12-14-95 you were interviewed by c/o Fender regarding the following issue(s):

You requested ETO to go to the law library.

An investigation of your complaint revealed the following:

I cannot grant ETO for you to go to the law library.

The following person(s) was/were interviewed in the course of the investigation:

_____ _____
Respondent Signature Printed Name

S065691

IN THE SUPREME COURT OF CALIFORNIA

IN RE REGINALD A. CHAVIS

ON

HABEAS CORPUS

Petition for writ of habeas corpus is DENIED.

SUPREME COURT
FILED
APR 29 1998
Robert Wandruff Clerk
/s/
DEPUTY

/s/
Chief Justice

S084374

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

IN RE REGINALD A. CHAVIS

ON

HABEAS CORPUS

Petition for writ of habeas corpus is DENIED. (*In re Clark* (1993) 5 Cal.4th 750; *In re Robbins* (1998) 18 Cal.4th 770, 780; *In re Dixon* (1953) 41 Cal.2d 756, 759.)

SUPREME COURT
FILED
MAR 29 2000
Frederick K. Ohlrich Clerk
/s/
DEPUTY

/s/
Chief Justice

REGINALD CHAVIS H-08159
P.O. BOX 5002
CALIPATRIA, CALIFORNIA
92233-5002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

In re the matter of:	)Case No.:
	) C1V. S-00-2496WBSGGH-P
REGINALD CHAVIS,	)
Petitioner,	) **PETITIONER' S**
V.	) **OPPOSITION TO**
SYLVIA GARCIA, WARDEN,	) **RESPONDENT'S**
Respondent	) **MOTION TO DISMISS**
	) **PETITION FOR WRIT**
_____	) **OF HABEAS CORPUS.**

I Reginald Chavis, make this opposition to respondents "MOTION TO DISMISS" this petition for writ of habeas corpus, and allege as follows:

I.

Federal habeas corpus review is appropriate and required, in this case,

II.

Petitioner is actually innocent; federal habeas corpus review is required to correct the constitutional violations that has resulted in the conviction of one who is actually innocent,

III.

This petition should not be dismissed, as it is not barred by 28

U.S.C. Section 2244 (d) (1) and (2), it is not untimely,

IV.

Petitioner is in custody, and detained illegally, pursuant to the invalid judgment of the State court, obtained in violation of the constitution, laws, and treaties of the United States,

V.

Petitioner agrees his state remedies have been properly exhausted,

VI.

Petitioner agrees with respondents I thru V, recital of historical facts recapped. Petitioner agrees with respondents VI recap, except for his contention that the application was "denied". In actual fact the petition was ordered, "NOT FILED" by the court as a result of petitioner's error to the Judicial Counsel Form,

VII.

Petitioner agrees with respondent's VI thru X as stated,

VIII.

Petitioner denies respondent's number XI, because respondent alleges petitioner's application is barred by the one-year statute of limitations of 28 U.S.C. section 2244 (d) (l) and (2)

IX.

Petitioner contends the application is properly filed under 28 U.S.C. section 2244 (d) (1) (B) and, (2). That is, state action in

violation of the constitution prevented petitioner from filing, by such state action; and because, under the unusual circumstances of this case, petitioner believes the limitation period does not bar petitioner from Federal Habeas Corpus relief

X.

If petitioner has exceeded the limitation period, the responsibility for that must be imputed to the State under the rationale of Coleman V. Thompson,

XI.

Extraordinary circumstances exist in this case, which justify Federal Habeas Corpus review, even if petitioner has inadvertently violated the period of limitations; in order to correct a fundamental injustice, violative of petitioner's fundamental liberties.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS.

ARGUMENT

Respondent's motion to dismiss should be denied. Respondent argues that petitioner's direct review became final on January 26,1993. Therefore, his federal petition was due one year from the enactment of the AEDPA, April 23,1997, plus any applicable tolling time, but that there are no tolling considerations to petitioners case. (Respondent's motion pp. 7-8)

However, petitioner contends that due to state created impediments before, and after, the existence, and enactment date of the AEDPA, petitioner is not barred from Federal habeas review, and petition is not untimely.

A. STATE CREATED IMPEDIMENTS

1). Before the existence of the AEDPA, or the enactment date, petitioner was being detained at Folsom State Prison. Petitioner had not yet exhausted his state remedies; he'd only filed habeas corpus to the Sacramento County Superior Court. Some time after the denial of that petition, petitioner was assigned prison duties. Petitioner was required to perform these duties 5 days weekly, on 7 and a half hour shifts per day - on the exact days and time which only, the law library (where petitioner would have access to necessary materials and information) was available to inmates. Petitioner was unable to have access to necessary materials and information needed, as custody refused to allow petitioner access to the law library. However, petitioner made efforts continually, to go forward with his collateral efforts without the access. Remaining confused and unable to understand the many technical matters confronting him, petitioner applied to the Appellate District on August 22,1994. As respondent notes, it was denied on September 29,1994.

At that time, however, petitioner's custodians continuously disallowed petitioner access to the prisons law library. Petitioner was indigent, without counsel, and without the means to get books to aid him. However, his filing of the inartistically drawn 1994 petition evidences petitioner continued to try to exhaust his state remedies in a timely manner, as the effort was made without the access. Petitioner's mother, Rosetta Seabrooks, aided petitioner by typing the document.

Being aware that he had been insufficiently and inadequately prepared before the last effort was made to the California Appellate District, and before custody would allow petitioner the needed access to the necessary materials and information--via allowing access to the law library, which could enable petitioner to present a correct and meaningful application--petitioner decided against risking, further, aggravating his predicament by again attempting to go forward with filing

another application with "guess work". Petitioner would try to persuade custody to allow him the access that he needed, first. Petitioner had no recourse to aid him in learning the proper legal bases, and grounds to assert, in support of his claims. Petitioner is a layman of law, and did not know of them. Finally, another inmate advised petitioner that custody's acts was an illegal deprivation of **access to the courts**, and that petitioner should pursue an administrative grievance. That was in December 1995. It was denied repeatedly, before February 1996, when petitioner finally was granted a partially favorable decision, which was not enacted before at least another month was passed. (The decision was to have petitioner reassigned to other duties that would allow petitioner access to the law library.)

The results are affected here because the state created obstacle upheld and halted petitioner's efforts to exhausting his state collateral actions, which would have been exhausted before the creation and enactment of the AEDPA, but not for custody's acts. Therefore, petitioner submits that the state's actions were directly responsible for petitioner's decision not to risk further aggravation to his predicament by going forward with an unmeaningful and improperly constructed application to the California Supreme Court. (This was a sensible decision petitioner made before the existence of the AEDPA). Petitioner was unable to have custody's actions changed before April 1996, therefore, at the time of the enactment date of the AEDPA (which petitioner was not even aware of at that time) not only was petitioner not suited to pursue a Federal application, but only barely ready to begin preparing his petition to the California Supreme Court. Petitioner asserted the state impediment as explanation to excuse any delay to his application to the Supreme Court, to his 1997 petition, and affixed the administrative grievance (affixed as exhibit 1 to this document).

2). After petitioner was allowed access to the law library, again petitioner's efforts to making the application to the California Supreme court were upheld, as a result of extended lockdowns

at the Folsom Prison facility. The year 1996 at Folsom State Prison saw a series of lockdowns. Petitioner does not have access to State record. However, in addition to the lockdowns in 1996, which came before it, the most recent in memory came in October 1996. The "C" facility on which petitioner was confined was put on lockdown continuously clear into February 1997, due to a riot that occurred on the neighboring "B" facility. The "C" facility then remained relatively lockdown free until August 11,1997, when an inmate workstrike precipitated another lockdown. The lockdown lasted throughout August and September due to reprisals taken against "strike breakers" shortly after every release. The remainder of 1997 saw numerous lockdowns due to gang violence.

For the foregoing reasons, petitioner contends that these were impediments created by the state. Therefore, petitioner contends that under the unusual circumstances of this case, where the state is responsible for halting petitioner's diligence to pursuing **meaningful** collateral pursuit of his claims, before it's existence, and not corrected until just before the enactment of the AEDPA, that the clock was "paused" for petitioner immediately after it's enactment date, until such time that petitioner was able to file his petition to the State Supreme Court of California, November 10,1997, where petitioner would have exhausted his state remedies before the existence of the statute, but not for the state's impediments.

If the Court does not allow for the pause in such a case, then it will "attach new legal consequences to events completed before (AEDPA's) enactment", contrary to the standard of CALDERON v. UNITED STATES DISTRICT C0URT (BEELER) 128 F3d. 1283, at 1287. The court also would allow the state to effectuate a neat and final escape from all responsibility for it's impediments, and petitioners would be penalized for the state actions which created delay to the diligence of claim pursuits.

Therefore, petitioner contends that his one-year clock could not begin to run before the filing of his Supreme Court petition,

or until after the denial of that petition, as the clock does not run when a petition is " FILED". (BEELER) Petitioner filed his first petition for post conviction relief on May 14, 1993, over three years before the existence of the (AEDPA). On August 22, 1994, petitioner filed for writ of habeas corpus with the California Court of Appeal. On September 29, 1994, the petition was denied. The statute remains tolled during the pending interval when petitioner is exhausting his state remedies. Therefore, on November 10, 1997, when petitioner filed his habeas corpus with the California Supreme Court, (AEDPA's) time period was tolled during the interval between the state court's disposition from the California habeas petition to the next level Court of Appeal to the filing of the state -The California Supreme Court. NINO V. GALAZA 183 F 3D. 1003 (9th CIR. 1999).

The date of APRIL 28, 1998, the California Supreme Court denied the petition.

ADDITIONAL TOLLING OR PAUSING CONSIDERATIONS.

There were more tolling and/or pausing considerations after the date of April 29, 1998, however. The Folsom State Prison was on emergency lockdown at the time that the California Supreme Court denied petitioners application. After being removed from that lockdown, on June 5, 1998 a melee' involving in excess of 75 white, black, and Hispanic inmates erupted on the exercise yard. The incident precipitated a lockdown that lasted well into August 1998. However, it should he noted that petitioner continued to take steps to help himself during that period. Petitioner gained the aid of two inmates, Joseph Hunt, and Allen Adams, while on the lockdown who were housed in nearby cells. These inmates helped petitioner learn of the proper **legal bases'** supporting petitioner's claims which petitioner had not known before. Petitioner's acquaintances helped petitioner with preparing two different

motions (the first-approximately June 27, 1998, and another September 2, 1998 because the state court failed to answer the first) which eventually succeeded in acquiring for petitioner the first "in camera" MARSDEN proceeding of April 29, 1991, where petitioner was first denied substitution of counsel. The Superior Court of Sacramento granted said second motion, on September 21, 1998, ordering that "the transcript be provided to petitioner after [paying] the cost of said transcript". Petitioner arranged to have his mother, Rosetta Seabrooks, pay the cost, and petitioner received his duplicate October 11, 1998. [In petitioner's previous applications to the state courts, unable to recall the specific factual occurrences of the before proceeding, petitioner basically referred to the fact that he had wanted to dismiss counsel but that it was denied. Petitioner explained that the proceeding was "unavailable" to him.] After learning of these proper bases', petitioner wondered about if they were adequately presented to the state courts (as petitioner already had asserted the previous bases without benefit of having the proceeding, and a "new light" was cast with the receipt of it), so as the "exhaustion" requirement was still satisfy to allow proper application for a Federal application. Receiving the specific facts from the hearing, and learning the proper legal bases, prompted petitioner to return to the state courts with a new properly grounded petition. These resulted in petitioner's applications of December 15, 1998, (ordered "not filed" on January 5 1999 due to petitioners error to the judicial counsel form, corrected and re-filed on January 25, 1999. It was denied February 24, 1999, but the decision was not mailed to petitioner due to state court error which was not corrected until the amended order of April 15, 1999, and petitioner did not know of the denial before that date. Petitioner was unable to complete his ongoing investigation for the filing of his second application to the California Supreme court before November 1999, -- due to more lockdowns while at the Folsom State Prison; and also, involuntarily and unexpectedly, petitioner was transferred away from Folsom to Calipatria State Prison where petitioner

presently is detained. Petitioner arrived to this institution in a state of lockdown and was separated from his personal property for a period of two months, and was unable to work on his situation.

After Calipatria custody finally re-issued petitioner his property, petitioner filed a "MOTION TO VACATE [PREVIOUS ORDER] WITH LEAVE; TO FILE A NEW PETITION" to the Supreme Court of California. Petitioners ongoing investigation uncovered that this was the procedure petitioner should first employ before filing a second or successive petition to the court, for newly discovered claims or newly learned legal bases to already known claims, in order to avoid a procedural default ruling. The answer to said motion was a letter to petitioner from the clerk of the court (affixed to this document as exhibit 2) stating that "no action may be taken on your motion to vacate ... The order of this court filed April 29, 1998, denying your petition for writ of habeas corpus was final forthwith and may not be amended or reconsidered". However, petitioner had learned that was the preferred procedure to follow from IN RE CLARK the superior court had cited in denying the second petition that petitioner had filed to it. On December 17, 1999, petitioner was able to file the second petition with the California Supreme Court. On March 29, 2000, the petition was denied.

Petitioner contends that he is within the statute of limitations of 28 USC section 2244 (d) (1) and (2), with proper considerations given to pausing the clock and/or equitable tolling, as a result of repeated state created impediments with which petitioner was encountered. Petitioner contends that his constant actions demonstrate his intent to be timely, without wanting to bypass or violate State or Federal procedural rules which petitioner was not familiar.

The court, in BENNETT V. ARTUZ 199 F.3D 116, 120 tells us that "A state court petition is 'pending' from the time it is first filed, until finally disposed of and further appellate review is an available under the particular state's procedures". MILLER V.

MARR, 141 f3D. 976, 978 (10th Cir. 1998) "The one year time period begins to run in accordance with **individual circumstances, that could reasonably affect** the availability of the remedy, but requires inmates to diligently pursue claims" at 978 (internal citations omitted) (citing CALDERON V. UNITED STATES DISTRICT COURT 128 F3d. 1283, 1289 (9TH CIR. 1997) (EN BANC), TAYLOR V. LEE, 186 F 3D. 557, 561, (holding that "the entire period of state post conviction proceedings, from initial filing, to final disposition by the highest state court ... is tolled from the limitations period"), NINO, 183 F 3D., AT 1004 (HOLDING THAT "THE TIME TOLLED FOR EXHAUSTION OF STATE REMEDIES PURSUANT TO 28 U.S.C. 2254 (D) INCLUDES THE INTERVAL BETWEEN THE DISPOSITION OF ... A POST CONVICTION PETITION AND THE FILING OF AN APPEAL AT THE NEXT LEVEL"); BARNETT V. LEMASTER, 167 F 3D 1321, 1323, (10 TH CIR. 1999) (holding that term **"pending" must be construed "to encompass all of the time during which a state prisoner is attempting, through proper use of state procedures, to exhaust state court remedies with regard to a particular post conviction application.")**

Petitioner contends that he is within the statute of limitations of 28 US section 2244 (d) (1) and (2) with the proper considerations to pausing of the clock and/or equitable tolling, as a result of the repeated state impediments which petitioner encountered.

B. IF ANY DEFAULT HAS OCCURRED, RESPONSIBILITY FOR THAT SHOULD BE IMPUTED TO THE STATE.

Petitioner contends that he is aggrieved by state impediment that has not yet been removed - that is, the state's responsibility for insuring that petitioner's right to proceed to trial, and to all "critical stage proceedings" represented, and by the effective

assistance of counsel. Petitioner contends that where the state has failed to satisfy it's responsibility to this requirement, the responsibility for any procedural default, if any has occurred here, must be imputed to the state under the rationale of COLEMAN V. THOMPSON, (1991) 501 U.S. 722, 754, 115 Led. 2d 640, 672, 111 S.Ct. 2546, where the UNITED STATES SUPREME COURT tells us that attorney error, arising at trial or at the level of petitioner's first appeal of right, which is grave enough to constitute ineffective assistance of counsel in violation of the Sixth Amendment "requires that the responsibility for the default be imputed to the state". In such an instance, any procedural default must be seen as an "external factor", i.e., "imputed to the state".

The AEDPA specifically makes an "impediment to filing an application, created by state action in violation of the laws of the United States" cause for setting aside a default on the one-year period of limitations. Here petitioner contends that:

1). Petitioner was forced to proceed to trial with the public defender with which he was unable to communicate, creating more personal conflicts, and that his counsel's ineffective assistance as alleged in petitioner's habeas application and the sworn declaration attached thereto, left petitioner deprived of his fundamental liberties, and was a lapse that must be imputed to the state.

2). On the unique facts of this case, it constitutes non-performance of the defense function and points to such a breakdown in the adversarial process as to make any showing of prejudice unnecessary, (See UNITED STATES v. CHRONIC 466 U.S. 648, 80 L.ED. 2ND 657, 101 S.Ct. 2039 (1989)).

3). That the impediment created by the states violation of petitioner's Sixth Amendment right to the effective assistance of trial and appellate counsel was not removed.

If this court does not recognize the above as an exception to AEDPA's 1-year period of limitations in this case, (where petitioner contends he is actually innocent), then it will have countenanced State action in violation of the constitution

resulting in a suspension of petitioner's Federal right to seek relief under 28 U.S.C. section 2241-2254. (U.S. Constitution, Article I, section 9, Clause 2). Petitioner is a layman of law. Petitioner had a tenth grade (equivalent) level of literacy. It is literally inconceivable that a person of his capacity and education, burdened with the limitations and circumstances attendant to a level-4 institution in California's prison system could, left entirely to his own devices by state action in violation of the constitution, recover from the disability of ineffective assistance of trial and appellate counsel. Should petitioner's position, that ineffective assistance of trial or appellate counsel, or both, not be deemed to constitute a factor tolling the one year term of limitations, then those individuals who are indigent and incapable of understanding the predicament that State action in violation of the constitution has placed them in (due to reasons such as mental impairment, psychological incapacity, illiteracy, and ignorance of the law), will see their rights to bring a Federal habeas petition suspended, both as a practical matter, and as a matter of law. Just as a person who commits a tort must take his victim as he finds him, the State should be responsible for the harm of it's violation to a defendant's Sixth Amendment rights, even where the incapacity of the defendant aggravates his predicament. To do otherwise would be to hold that only prisoner's who are brilliant and resourceful enough to grasp how the state has defaulted it's Sixth Amendment responsibilities, retain the right to seek re-dress in Federal court for that default. This sort of an interpretation would violate the equal protection clause of the 14th Amendment. If such an exception is not made, then even a mentally incompetent inmate (not merely one who is helpless without legal assistance), whose Sixth Amendment right to the effective assistance of trial counsel was violated would be time barred from bringing such claims, in all cases, where even facially valid claims are discovered after the year has lapsed. Such a conclusion would be fundamentally unfair and violative of the 14th Amendment guarantee.

C. EVEN IF PETITIONER HAS INADVERTANTLY PASSED THE PERIOD OF LIMITATIONS, FEDERAL REVIEW IS NECESSARY TO PREVENT A MISCARRIAGE OF JUSTICE VIOLATIVE OF PETITIOENER'S FUNDAMENTAL LIBERTIES.

The State Supreme Court in SMITH V. CARRIER, SUPRA, 477 U.S. at 537 has recognized a "fundamental miscarriage of justice" exception to the cause and prejudice requirement. It has been noted in ENGLE and reaffirmed in CARRIER, "in appropriate cases the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperatives of correcting a fundamentally unjust incarceration.'" MURRAY V. CARRIER, ante, at 495 91 Led. 2nd 397, quoting, ENGLE V. ISAAC, 456 U.S. at 135, 71 Led. 2nd 783. Accordingly, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a Federal habeas corpus court may grant the writ even absence of a showing of cause for the default."

In the present case, constructively, petitioner was deprived of counsel after he was forced to proceed to trial, though he was unable to communicate with his appointed public defender, after his initial, timely request for substitution of counsel, was denied before his trial. Then counsel went on "fictitiously", to represent petitioner, forcing petitioner to be binded to his errors, omissions, and misconduct, against petitioner's will, and in contravention of petitioner's fundamental rights.

Although, the rationale underlying the Supreme Court's decision in FARETTA is not difficult to understand: Put quite simply it is that the State may not, **constitutionally**, prevent a defendant charged with commission of a criminal offense, from controlling his own fate, by forcing on him, counsel who may not present a case which is not consistent with the actual wishes of the defendant-however, petitioner was denied the right in this case, and irretrievable defenses (ie, a motion for a new trial at the trial level) were lost. Appointed counsel refused to move

for a new trial on the grounds of incompetence of counsel at one point, because already he'd determined "I was not incompetent" as he stated to the court, and the court would not recognize petitioner ". . because you have an attorney". Ultimately, Mr. Weis called petitioner a "DUMB NIGGER", and petitioner was still forced to proceed with him.

This court has proper jurisdiction to save petitioner's fundamental liberties.

(FAY V. NOIA, at pp. 859-860, "..The Federal District Court has broad power on habeas corpus to hold an evidentiary hearing and determine the facts. The breadth of the federal courts power of independent adjudication on habeas corpus stems from the very nature of the writ, and conforms with the classic English practice. As put by Mr. Justice Holmes in his dissenting opinion in FRANKLIN V. MAGNUM, (237 U.S . at 348), 'If the petition discloses facts that amount to a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision above.' It is the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment to them is not merely erroneous, but void. (also) ..."conventional notions of finality in criminal litigation can not be permitted to defeat the manifest federal policy that federal constitutional rights **shall not be denied** without the fullest opportunity for plenary review."

CONCLUSION

Glaring constitutional error of the first magnitude occurred in petitioner's case. Now the state of California wants to take further advantage of petitioner's utter fecklessness when it comes to the law by enlisting this court in the denial of this petition, because petitioner, inadvertently, may have taken longer than a year evading state created impediments, and exhausting his state remedies, to the state's violation of his

constitutional liberties. As with the wrongdoer that seeks to avoid responsibility for injuries resulting from his wrongful conduct, on theory that his conduct, although reprehensible, only proved to be devastating to plaintiff because of pre-existing infirmities in said plaintiff, the State of California should not be allowed to effectuate a neat and final escape from all responsibility for effective counsel to those who need it most- that category of inmate who is personally unable to understand his substantive rights and the procedural imperatives related to their presentation. Any other finding would mean, in essence, that illiterates, the learning impaired, foreigners, and people with mental or psychological problems, who are essentially without hope of ever being gifted through the help of others with a remedy, will find their rights suspended, where their convictions were obtained in derogation of their right to effective assistance of trial or appellate counsel.

D. STATE'E FAILURE TO FORMALLY ANSWER PETITIONER'S CLAIMS

Petitioner submits that the States choice not to answer to each of petitioner's claims individually, of his petition to this court should be regarded as an admission as "TRUE", as to all grounds. Petitioner should be granted a new trial, and/or whatever other relief this court deems appropriate.

DATED: March 2, 2001

RESPECTFULLY SUBMITTED /s/ H-08159

I, Reginald Chavis, declare as follows:

I am actually innocent. I believe that my constitutional rights to counsel were violated throughout every stage of my criminal proceedings. I was unable to communicate with my appointed public defender Vincent Weis, even before the start of my preliminary examination because of the conflicts stemming from the f. ct that he was insulting me, he would not listen to me, and I felt he needed to listen to me in order for me to have a chance at proving my actual innocence. He was unwanted, by me, and I did not want to risk having him represent me because he said "there's no way in hell you can win this case and anyone who says that you can doesn't know what the hell they are talking about" and he would not hear nothing other. He said this to me after suggesting to me that he could work a plea bargain to get me 14yrs, and I rejected for him to make such an attempt, telling him I'm actually innocent. I was forced to proceed with him anyway and I believe my trial was extraordinarily unfair because of it. I tried to obtain rectification at my criminal proceedings, repeatedly. I stated to the trial court I believed I had "constitutional rights" being denied. After I was convicted and sentenced, I fully informed my appointed appellate counsel, instructing him to pursue counsel claims and he declined and did not do so. He raised his choice of appeal issues, to the High Court of the State, and informed me that he would raise a federal writ and I declined to consent to that, because my counsel claims would not be included. With the measure of education that I had at that point in time, and my layman status, I did not know how to state a meaningful claim, but I made an effort. I was upheld in my efforts to learn how by my state custodians conduct depriving me of materials where I could have meaningful access to the courts. My efforts, and timeliness were further upheld by the many extended lockdowns of the state prisons to which I was detained. I believe the state is responsible if any procedural default has occurred. I believe that it will be a tremendous

miscarriage of justice if I am unable to obtain Federal review of my present illegal incarceration.

I declare under penalty of perjury that the foregoing is true and correct, except for those matters stated on my belief, and as to those matters I believe them to be true.

Executed this day:

Date: March 2, 2001

BY: /s/ H-08159

EXHIBIT 1

State of California Department of Corrections

INMATE/PAROLEE
APPEAL FORM
CDC 802 (12/87)

Location: Institution/Parole Region Log No. Category
1. CSP-SAC 1. 95-03353 10
2. Sac-C 2. Library access-ETO

You may appeal any policy, action or decision which has a significant adverse affect upon you. With the exception of Serious CDC 115s, classification committee actions, and classification and staff representative decisions, you must first informally seek relief through discussion with the appropriate staff member, who will sign your form and state what action was taken. If you are not then satisfied, you may send your appeal with all the supporting documents and not more than one additional page of comments to the Appeals Coordinator within 15 days of the action taken. No reprisals will be taken for using the appeals procedure responsibly.

NAME NUMBER ASSIGNMENT UNIT/ROOM NUMBER
Chavis H-08159 PTR.060 C 7115

A. Describe Problem: This inmate is assigned to the above stated position as a seven block (tier tender), with stipulated RDO's being Sun/Mon. I am currently without a hired attorney but, I work pro-per on my criminal case and I am in the process of attempting to pursue a filing of a habeas corpus petition on my criminal conviction. In order to complete my petition it is necessary for me to get into C-facility's law library to research and obtain the required law, points and authorities to validate my filing. My problem is that the law library is closed on Sun/Mon, which, (refer to attachment)

If you need more space, attach one additional sheet.

B. Action Requested: That I be granted use of excused time off in accord to Section 3045.2 (2)(G)(5) of the Title 15, in two hour increments 5 days weekly after finishing my assigned duties, to have reasonable access to the law library as soon as possible.

Inmate/Parolee Signature: /s/ H-08159
Date Submitted: 12-12-95

C. INFORMAL LEVEL (Date Received:_____)
Staff Response: See attached

Staff Signature: See attached
Date Returned to Inmate: _____

D. FORMAL LEVEL
If you are dissatisfied, explain below, attach supporting documents (Completed CDC 115, Investigator's Report, Classification chrono, CDC 128, etc.) and submit to the Institution/Parole Region Appeals Coordinator for processing within 15 days of receipt of response.

My superior says that he can't grant me ETO. However, in accord to 3045.2 (2)(G)(5) the lieutenant or high authority can do so. Please do so, so that I may continue good programming as per CDC's expectations for me to work an assignment. A-1-A unassign me or change me to a PM assignment A.S.A.P. Thank-you.

Signature: /s/ H-08159
Dated Submitted: 12-19-95

Note: Property/Funds appeals must be accompanied by a completed Board of Control form BC-TE, Inmate Claim

RECEIVED
DEC 22 1995
CSP-SAC

First Level ___ Granted ___ P. Granted _X_ Denied
___ Other

E. REVIEWER'S ACTION (Complete within 15 working days): Date assigned: DEC 27 1995 Due Date: _____
Interviewed by: See Attached

Staff Signature: /s/ Title: Sgt.
Dated Completed: JAN 18 1996
Division Head Approved: Signature /s/ Title: Capt
Returned Date to Inmate: JAN 23 1996

F. If dissatisfied, explain reasons for requesting a Second-Level Review, and submit to Institution or Parole Region Appeals Coordinator within 15 days of receipt of response.

I am effectively being denied access to the courts at this point, I believe this is illegal and in contravention of my limited civil rights. Please grant me ETO or Re-assign me to a PM assignment.

Signature: /s/ H-08519 Dated Submitted: 2-1-96

Second Level ___ Granted _X_ P. Granted ___ Denied
___ Other

G. REVIEWER'S ACTION (Complete within 10 working days): Date assigned: FEB 08 1996 Due Date: _____
___ See Attached Letter

Signature: /s/ Dated Completed: FEB 16 1996
J.C. WALKLEY, AWP(A)
Warden/Superintendent Signature: /s/
T. WHITE, WARDEN
Date Returned to Inmate: FEB 19 1996

H. If dissatisfied, add data or reasons for requesting a Director's Level Review, and submit by mail to the third level within 15 days of receipt of response.

Signature: _____ Date Submitted: _____

For the Director's Review, submit all documents to:

Director of Corrections
P.O. Box 942883
Sacramento, CA 94283-0001
Attn: Chief, Inmate Appeals

DIRECTOR'S ACTION: ___ Granted ___ P. Granted
___ Denied ___ Other
___ See Attached Letter

Date: _____

Inmate Appeal Continued

incidently are also my assigned RDO's. The library closes at about 1:45 p.m. during it's open days of the week, and this inmate is not permitted to be relieved from duty until 1:30 p.m. I have no reasonable access to the law library. I have discussed this problem with c/o Fender who supervises me, and he advises me that he can not relieve me from duty to go to the library regardless of the circumstances.

I asked that I be granted use of (ETO) in accord to section 3045.2 (2)(G)(5) of the title 15, which indicates that (ETO) may be used for "non-routine recreation and entertainment activities" and c/o Fender denied me that request.

This inmate can not get a PLU status without filing the proper documents to the court and, I can not file the proper documents to the court without reasonable access to the law library for required case law, points and authorities.

I have tried to convieniently resolve this situation in several ways before taking this action:

(1) I have asked and talked to c/o Fender, my supervisor.

(2) I have written the law librarian and asked for PLU status as a result of my sitution, to which I never received a response.

(3) I also submitted a Job Change application which was approved over a month ago but never occurred for reasons unknown.

To Second Level

My supervisor says that he can not grant me ETO for use of the access to law library however, in accord to the above cited title 15 section the lieutenant and higher authority can. I would request that it be granted of me so that I can get my legal business handled and still conform to CDC's programming of continuing to work my assignment. If I can not be granted ETO, please unassign me from this position to A-1-A unassigned or change me to a

State of California

MEMORANDUM

FORMAL RESPONDENT c/o Fender

Date: 12-13-95

To: Inmate Chavis H-08159
(NAME) (CDC#)

From: California State Prison-Sacramento, Represa 95671

Subject: INFORMAL LEVEL APPEAL
UNIT LOG # 1295 C-921

Appeal is (indicate one) GRANTED / PARTIALLY GRANTED / **DENIED** / OTHER

On 12-14-95 you were interviewed by c/o Fender regarding the following issue(s):

You requested ETO to go to the law library.

An investigation of your complaint revealed the following:

I cannot grant ETO for you to go to the law library.

The following person(s) was/were interviewed in the course of the investigation:

_____ _____
Respondent Signature Printed Name

State of California

MEMORANDUM

Date: January 12, 1996

To: Inmate Chavis (H-08159)

From: California State Prison-Sacramento, Represa 95671

Subject: APPEAL LOG # SAC-C-95-03353 (FIRST LEVEL RESPONSE)

SUMMARY OF APPEAL

You wish to utilize the services of the C Facility Legal Library. Unfortunately, the library hours of operation coincide with your assigned work hours. You are requesting use of ETO time during your work hours to go to the library.

SUMMARY OF INVESTIGATION

On January 12, 1996, you were interviewed and an investigation was conducted by this writer regarding the above-noted appeal. During my investigation I found that use of ETO time is not an option for you in this circumstance. California Code of Regulations, Title 15, Section #3045.2 specifies authorized use of ETO time. Access to the Legal Library is not listed, nor is it considered a "non-routine recreation and entertainment" activity, as you suggest.

You best option at this point is to request a work assignment change that would allow access to the Legal Library as a GLU.

APPEAL RESPONSE

For the reasons cited above your appeal is DENIED.

/s/
B. MCJUNKIN
Program Sergeant, 2/W
C Facility

BM:lj

RECEIVED
JAN 17 1996
CSP-SAC
APPEALS OFFICE

SUPPLEMENT PAGE

RE: California State Prison-Sacramento (SAC)
Second Level Reviewer's Response
Appeal Log #: SAC-C-95-03353
Date: February 8, 1996

/s/
FEB 16 1996

Inmate: Chavis, H-085159

APPEAL ISSUE: (Modified)
Legal

APPEAL DECISION:

PARTIALLY GRANTED (MODIFICATION ORDER)

APPEAL RESPONSE

K. L. Markey, Appeals Coordinator, was assigned to investigate your appeal at the Second Level of Review.

All submitted documentation and supporting arguments have been considered, including the interview conducted at the First Level of Review (FLR). Additionally, a thorough investigation has been conducted regarding the claim presented by you and evaluated in accordance with SAC's Operational Procedures (OP's) and the California Code of / Regulations (CCR), Title 15.

SUMMARY OF APPEAL

You contend that you wish to utilize Excused Time Off (ETO) to go to the Law Library, or you wish to receive a job change to a Third Watch position in order to accommodate your Law Library access.

SUMMARY OF INVESTIGATION

The Department's rule regarding use of ETO is contained in the California Code of Regulations (CCR), Title 15, Section 3045.2.

The First Level Reviewer has informed you that the use of ETO does not include an inmate's desire to utilize the Law Library. However, you will be referred to the Unit Classification Committee (UCC) who shall review your job assignment, and make a determination concerning your placement in a Third Watch work position.

APPEAL RESPONSE

For the reasons cited above, your appeal is **PARTIALLY GRANTED**. The Appeal's Office will prepare a **MODIFICATION ORDER** instructing the C-Facility Captain to have you appear before the Unit Classification Committee (UCC). UCC will determine whether you can be assigned to a Third Watch work position to accommodate your needs for use of the Law Library.

/s/
THEO WHITE
Warden

TW:km
cc: Inmate Appeals Unit
Central File

EXHIBIT 2

SUPREME COURT OF CALIFORNIA

ROBERT F. WANDRUFF
COURT ADMINISTRATOR AND
CLERK OF THE SUPREME COURT
1 December 1999

Reginald A. Chavis, H-08159
P.O. Box 5002
Calipatria, CA 92233

Re: S065691 - In re Chavis on Habeas Corpus

Dear Sir:

No action may be taken on your motion to vacate, received today in the above-entitled matter. The order of this court filed April 29, 1998, denying your petition for writ of habeas corpus was final forthwith and may not be amended or reconsidered. Please rest assured, however, that the entire court considered the petition and the contentions made therein and the denial expresses the court's decision in this matter.

If you wish to file a new petition for writ of habeas corpus, I have enclosed the form approved by the Judicial Council.

Very truly yours,

ROBERT F. WANDRUFF
Court Administrator and
Clerk of the Supreme Court
/s/
By: John C. Rossi
Assistant Clerk-Administrator

JCR:
Enclosures

VERIFICATION

STATE OF CALIFORNIA
COUNTY OF IMPERIAL

(C.C.P. SEC. 446 & 2015.5; 28 U.S.C. SEC. 1746)

I, Reginald Chavis DECLARE UNDER THE PENALTY OF PERJURY THAT: I AM THE Petitioner IN THE ABOVE ENTITLED ACTION; I HAVE READ THE FOREGOING DOCUMENTS AND KNOW THE CONTENTS THEREOF AND THE SAME IS TRUE OF MY OWN KNOWLEDGE, EXCEPT AS TO MATTERS STATED THEREIN UPON INFORMATION, AND BELIEF, AND AS TO THOSE MATTERS, I BELIEVE THEM TO BE TRUE.

EXECUTED THIS March DAY OF 02, 2001, AT CALIPATRIA STATE PRISON, CALIPATRIA, CALIFORNIA 92233-5002

(SIGNATURE) /s/
(DECLARANT/PRISONER)

PROOF OF SERVICE BY MAIL

(C.C.P. SEC. 1013(a) & 2015.5; 28 U.S.C. SEC. 1746)

I, Phillip N. Thompson, AM A RESIDENT OF CALIPATRIA STATE PRISON, IN THE COUNTY OF IMPERIAL, STATE OF CALIFORNIA; I AM OVER THE AGE OF EIGHTEEN (18) YEARS OF AGE AND AM/AM NOT A PARTY OF THE ABOVE-ENTITLED ACTION. MY STATE PRISON ADDRESS IS: P.O. BOX 5002, CALIPATRIA, CALIFORNIA 92233-5002

ON March 2, 2001, I SERVED THE FOREGOING:

Petitioner's Opposition To Respondents Motion To Dismiss Petition For Habeas Corpus.
(SET FORTH EXACT TITLE OF DOCUMENTS SERVED)

ON THE PARTY(S) HEREIN BY PLACING A TRUE COPY(S) THEREOF, ENCLOSED IN A SEALED ENVELOPE(S), WITH POSTAGE THEREON FULLY PAID, IN THE UNITED STATES MAIL, IN A DEPOSIT BOX SO PROVIDED AT CALIPATRIA STATE PRISON, CALIPATRIA, CALIFORNIA 92233-5002

Arnold O. Overoye
Senior Assistant Attorney General
State Bar No. 37631
1300 I Street Suite 125
PO Box 944255
Sacramento, California 94244-2550

United States District Court
For Eastern District of California
501 I Street, STE 4-200
Sacramento, California 95814-2322

THERE IS DELIVERY SERVICE BY UNITED STATES MAIL AT THE PLACE SO ADDRESSED, AND THERE IS REGULAR COMMUNICATION BY MAIL BETWEEN THE PLACE OF MAILING AND THE PLACE SO ADDRESSED. I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

DATE: 3/02/01, 2001 /s/
(DECLARANT/PRISONER)

BILL LOCKYER
Attorney General of the State of California
DAVID P. DRULINER
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
ARNOLD O. OVEROYE
Senior Assistant Attorney General
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Telephone: (916) 324-5282
Fax: (9 16) 324-2960
Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

REGINALD CHAVIS, Petitioner,	)	CIV S-00-2496 WBS GGH P
v.	)	**RESPONDENT'S REPLY TO**
SYLVIA GARCIA,	)	**PETITIONER'S OPPOSITION**
Respondent.	)	**TO RESPONDENT'S MOTION**
	)	**TO DISMISS**

INTRODUCTION

On August 30, 2000, Petitioner filed a petition for writ of habeas corpus. On December 14, 2000, this Court ordered Respondent to file a response to the petition. On February 13, 2001, Respondent filed a motion to dismiss because the petition had been filed beyond the one-year statute of limitations contained in 28 U.S.C., section 2244(d)(1) and (2). On March 7, 2001, Petitioner filed an opposition to Respondent's motion to dismiss. Respondent hereby replies to the allegations of

Petitioner's opposition.

In Petitioner's opposition he claims that: (1) state-created impediments prevented timely filing; and (2) that he is innocent. Petitioner's claims are without merit.

Petitioner was convicted on September 6, 1991. Exh. A Motion. The California Court of Appeal, Third Appellate District affirmed Petitioner's conviction on July 30, 1992. Exh. B. to Motion. On September 2, 1992, Petitioner filed a petition for review with the California Supreme Court. On October 28, 1992, the petition was denied. Exh. C to Motion. Petitioner's direct state appeal then became final on January 26, 1993, after the ninety day period in which to file a petition for writ of certiorari with the United States Supreme Court expired. *Bowen v. Roe*, 188 F.3d 1157, 1158-1159 (9th Cir. 1999); *Rhine v. Boone*, 182 F.3d 1153, 155 (10th Cir. 1999). Therefore, Petitioner's federal petition was due within one year after the April 24, 1996, enactment of the AEDPA, plus all applicable tolling. *Calderon v. United States Dist. Court (Beeler)*, 128 F.2d 1283, 1286 (9th Cir. 1997).

ARGUMENT

After Petitioner's direct state appeal was final, Petitioner filed his first collateral action on May 14, 1993, in the Sacramento County Superior Court. On July 30, 1993, the petition was denied. Exh. D to Motion. Petitioner thereafter delayed more than one year, and on August 22, 1994, filed a habeas petition in the California Court of Appeal, Third Appellate District. On September 29, 1994, the petition was denied. Since both of these collateral actions were filed *prior* to the enactment of the AEDPA, neither action provides Petitioner with any tolling. *Hill v. Keane*, 984 F.Supp. 157, 159 (E.D.N.Y. 1997).

Thereafter, Petitioner did not file any state collateral actions until November 10, 1997, when he filed a petition for writ of habeas corpus in the California Supreme Court. That petition does not provide Petitioner with tolling since it was filed *after*

the statute of limitations expired. *Green v. White*, 223 F.3d 1001 (9th Cir. 2000); *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000); *Blouin v. Headley*, 70 F.Supp.2d 282, 285-286 (S.D.N.Y. 1999); *Sorce v. Artuz*, 73 F.Supp.2d 292, 294. In his opposition, Petitioner claims that during 1995 through 1996, due to his full-time prison employment, he did not have access to the law library because the library was closed during his off work hours.[1/] Opp., pp. 4-6. In December of 1995, Petitioner sought to change this situation through the inmate appeal process. On March 5, 1996, after an investigation by the institution. Petitioner was given a different job assignment which would allow him proper access to the law library. Exh. A.

However, even after Petitioner gained access to legal materials, he still delayed approximately eighteen months before he filed a state collateral action on November 10, 1997, with the California Supreme Court. On April 29, 1998, the petition was denied. Exh. E to Motion. Petitioner then delayed another eight months before attempting to file a habeas petition in the Sacramento County Superior Court on December 15, 1998.[2/] Exh. F. to Motion. On January 25, 1999, Petitioner filed a third petition for writ of habeas corpus with the Sacramento County Superior Court, case number 99F00573. On February 24, 1999, the petition was denied. Exh. G to Motion. On December 17, 1999, Petitioner filed a second petition for writ of habeas corpus with the California Supreme Court. On February 24, 1999, the petition was denied. Exh. H to Motion.

Petitioner explains his further delay in pursuing his state claims by another state-created impediment, i.e., institutional lockdowns prevented law library access. Opp., pp. 6-8.

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1. During this time period, Petitioner was housed at California State Prison - Sacramento.

2. On January 5, 1999, the Sacramento County Superior Court returned the petition to Petitioner because it was not on a proper California Judicial Council form.

However, Respondent has obtained certain pages of a Handbook Guide to Library Procedures from the California State Prison - Sacramento, which provides the procedures taken to provide prison inmates with legal materials when lockdowns are in place. Exh. B. Through a "paging system" inmates are allowed to receive copies of library materials during prison lockdowns. Based on this system, it is clear that Petitioner was not prevented from using law library materials to prepare his state collateral actions. Moreover, run of the mill claims such as lockdowns preventing timely filing are not considered extraordinary circumstances for equitable tolling. *Rosada v. Schomig*, 64 F.Supp.2d 790, 796 (C.D.Ill 1999). Alleged impediments including library access, lockdowns, and lost transcripts were rejected where petitioner had five years and failed to show actual interference throughout the year. *Akins v. U.S.*, 204 F.3d 1086 (11th Cir. 2000). The Constitution does not guarantee unlimited access to the law library and an inmate having to wait for his or her turn does not deny access to the courts. *Lindquist v. Idaho Board of Corrections*, 776 F.2d 851, 858 (9th Cir. 1985); *Miller v. New Jersey Department of Corrections*, 145 F.3d 616, 618-619 (3rd Cir. 1998); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998). A petitioner's failure to show diligent pursuit of federal claims may also be invoked in claims of prison adversities generally. They include prison lockdowns which were rejected as an excuse in *U.S. v. Van Poyck*, 980 F.Supp. 1109 (C.D. Cal. 1997) where a petitioner made no showing how alleged multiple institutional lockdowns interfered with the year available to file. Indeed, institutional lockdowns have been recognized not as an extraordinary circumstance but as a routine restriction on prison life which a prisoner must take into account. *Akins v. Harris*, 1999 W.L. 13719 (N.D. Cal. 1999).

Thus, Petitioner has failed to overcome the statute of limitations. Petitioner had the entire one-year period between April 24, 1996, when the AEDPA was enacted, and the expiration of the statute of limitations on April 23, 1997, to

timely file state collateral actions. Petitioner failed to timely file and, therefore, all his collateral actions filed after the April 23, 1997, date do not provide Petitioner with tolling since the statute of limitations had already expired. *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000); *Blouin v. Headley*, 70 F.Supp.2d 282, 285-286 (S.D.N.Y. 1999); *Sorce v. Artuz*, 73 F.Supp.2d 292, 294.

Moreover, Petitioner's further claims of not knowing the proper legal claims to pursue, the time it took for him to obtain a copy of a *Marsden* hearing transcript[3], and being moved from California State Prison - Sacramento to Calipatria State Prison also contributed to the delay. Deficiencies related to a petitioner's lack of knowledge or expertise have generally been rejected. *Smith v. McGinnis*, 208 F.3d 13, 18 (2nd Cir. 2000); *Kibler v. Walters*, 197 F.3d 1251, 1252 (9th Cir. 2000) (lack of knowledge of state law not cause); *Turner v. Johnson*, 177 F.3d 390, 392 (5th Cir. 1999) (lack of familiarity with process and lack of representation, regardless of illiteracy); *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999) (ignorance of law no excuse); *Eisermann v. Penrosa*, 33 F.Supp.2d 1269, 1273 (D.Haw. 1999) (lack of legal expertise); *Rose v. Dole*, 945 F.2d 1331, 1335 (6th Cir. 1991) and *Richard v. Mileski*, 662 F.2d 65, 71, n. 10 (D.C. Cir. 1981) (ignorance of the law); *Fadayiro v. U.S.*, 30 F.Supp.2d 772, 781 (D. N.J> 1998) (ignorance of the law no excuse); *Moore v. Hawley*, 7 F.Supp.2d 901, 904 (E.D. Mich. 1998) (ignorance of the law not excusable neglect); *Miller v. Marr* at 978. (petitioner didn't know about statute).

Lastly, Petitioner's claim of innocence is actually a claim of ineffective assistance of counsel, i.e., but for counsel's ineffective representation, Petitioner would have been found not guilty. In any event, in raising a claim of innocence, a petitioner must go beyond demonstrating doubt about his guilt, but must affirmatively prove his innocence. *Lorensten v. Hood*, 223 F.3d 950, 954 (9th Cir. 2000); *Jackson v. Calderon*, 211 F.3d 1148,

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3. *People v. Marsden*, 2 Cal.3d 118 (1970).

1165 (9th Cir. 2000). Petitioner's ineffective assistance of counsel claim does not show actual innocence; rather, he must independently establish factual innocence to have his claim heard. *Schlup v Delo*, 513 U.S. 298, 327-329. Petitioner had a jury trial and was found guilty of attempted murder. A petitioner "must show that is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327-329. Again, Petitioner has made no showing of his innocence.

Petitioner's federal petition for writ of habeas corpus must be dismissed.

Dated: March 22,2001

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California
DAVID P. DRULINER
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General

/s/
ARNOLD O. OVEROYE
Senior Assistant Attorney General

Attorneys for Respondent

EXHIBIT A

CSP - SACRAMENTO
INMATE APPEAL OFFICE

MODIFICATION ORDER

TO: AWP C-Facility Captain
DATE: February 16, 1996
INMATE: Chavis
NUMBER: H-08159
APPEAL LOG # SAC: C-95-03353
OTHER: Change Work Assignment
MOD ORDERED BY: Second Level
DUE DATE: March 16, 1996

The inmate appeal listed above has been PARTIALLY GRANTED/GRANTED. Please review the attached appeal response and take necessary action to comply by the due date shown above.

SPECIFIC ACTION REQUIRED: Have inmate appear before UCC and determine if he can be assigned to, a Third Watch job assignment to make it possible for him to go to the Law Library during the day.

Upon completion, please make the appropriate notation at the bottom of this form, attach supporting documentation, and return it to the Inmate Appeals Office so it may be recorded and the file closed on this appeal.

/s/
K.L. Markey
APPEALS COORDINATOR
INMATE APPEALS OFFICE

DATE OF ACTION: 3-5-96

ACTION TAKEN: UCC committee removed "s" from his current assignment as 7 Block Porter. Placed "s" on 3S/WL per request, recommending PM Porter position. "s" retains his A 1/A until reassigned.

PERSON TAKING ACTION: /s/

SIGNATURE: /s/ TITLE: CCI
M.A./Geddis

APPEALS OFFICE PROCESSING
cc: c-file
chief, Inmate Appeals Branch (3rd Level orders)

MAR 05 1996

SUPPLEMENT PAGE

RE: California State Prison-Sacramento (SAC)
Second Level Reviewer's Response
Appeal Log #: SAC-C-95-03353
Date: February 8, 1996

/s/
Inmate: Chavis, H-085159 FEB 16 1996

APPEAL ISSUE: (Modified)
Legal

APPEAL DECISION:

PARTIALLY GRANTED (MODIFICATION ORDER)

APPEAL RESPONSE

K. L. Markey, Appeals Coordinator, was assigned to investigate your appeal at the Second Level of Review.

All submitted documentation and supporting arguments have been considered, including the interview conducted at the First Level of Review (FLR). Additionally, a thorough investigation has been conducted regarding the claim presented by you and evaluated in accordance with SAC's Operational Procedures (OP's) and the California Code of / Regulations (CCR), Title 15.

SUMMARY OF APPEAL

You contend that you wish to utilize Excused Time Off (ETO) to go to the Law Library, or you wish to receive a job change to a Third Watch position in order to accommodate your Law Library access.

SUMMARY OF INVESTIGATION

The Department's rule regarding use of ETO is contained in the California Code of Regulations (CCR), Title 15, Section 3045.2.

The First Level Reviewer has informed you that the use of ETO does not include an inmate's desire to utilize the Law Library. However, you will be referred to the Unit Classification Committee (UCC) who shall review your job assignment, and make a determination concerning your placement in a Third Watch work position.

CALIFORNIA STATE PRISON - SACRAMENTO
APPEAL LOG # SAC-C-95-03353
CHAVIS, H-08159
February 8, 1996
Page 2

APPEAL RESPONSE

For the reasons cited above, your appeal is **PARTIALLY GRANTED**. The Appeal's Office will prepare a **MODIFICATION ORDER** instructing the C-Facility Captain to have you appear before the Unit Classification Committee (UCC). UCC will determine whether you can be assigned to a Third Watch work position to accommodate your needs for use of the Law Library.

/s/
THEO WHITE
Warden

TW:km
cc: Inmate Appeals Unit
Central File

State of California Department of Corrections

INMATE/PAROLEE
APPEAL FORM
CDC 802 (12/87)

Location:	Institution/Parole Region	Log No.	Category
1.	CSP-SAC	1. 95-03353	10
2.	Sac-C	2.	Library access-ETO

You may appeal any policy, action or decision which has a significant adverse affect upon you. With the exception of Serious CDC 115s, classification committee actions, and classification and staff representative decisions, you must first informally seek relief through discussion with the appropriate staff member, who will sign your form and state what action was taken. If you are not then satisfied, you may send your appeal with all the supporting documents and not more than one additional page of comments to the Appeals Coordinator within 15 days of the action taken. No reprisals will be taken for using the appeals procedure responsibly.

NAME	NUMBER	ASSIGNMENT	UNIT/ROOM NUMBER
Chavis	H-08159	PTR.060	C 7115

A. Describe Problem: This inmate is assigned to the above stated position as a seven block (tier tender), with stipulated RDO's being Sun/Mon. I am currently without a hired attorney but, I work pro-per on my criminal case and I am in the process of attempting to pursue a filing of a habeas corpus petition on my criminal conviction. In order to complete my petition it is necessary for me to get into C-facility's law library to research and obtain the required law, points and authorities to validate my filing. My problem is that the law library is closed on Sun/Mon, which, (refer to attachment)

If you need more space, attach one additional sheet.

B. Action Requested: That I be granted use of excused time off in accord to Section 3045.2 (2)(G)(5) of the Title 15, in two hour increments 5 days weekly after finishing my assigned duties, to have reasonable access to the law library as soon as possible.

Inmate/Parolee Signature: /s/ H-08159
Date Submitted: 12-12-95

C. INFORMAL LEVEL (Date Received:_____)
Staff Response: See attached

Staff Signature: See attached
Date Returned to Inmate: _____

D. FORMAL LEVEL
If you are dissatisfied, explain below, attach supporting documents (Completed CDC 115, Investigator's Report, Classification chrono, CDC 128, etc.) and submit to the Institution/Parole Region Appeals Coordinator for processing within 15 days of receipt of response.

My superior says that he can't grant me ETO. However, in accord to 3045.2 (2)(G)(5) the lieutenant or high authority can do so. Please do so, so that I may continue good programming as per CDC's expectations for me to work an assignment. A-1-A unassign me or change me to a PM assignment A.S.A.P. Thank-you.

Signature: /s/ H-08159
Dated Submitted: 12-19-95

Note: Property/Funds appeals must be accompanied by a completed Board of Control form BC-TE, Inmate Claim

RECEIVED
DEC 22 1995
CSP-SAC

First Level ___ Granted ___ P. Granted _X_ Denied
___ Other

E. REVIEWER'S ACTION (Complete within 15 working days): Date assigned: DEC 27 1995 Due Date: _____
Interviewed by: See Attached

Staff Signature: /s/ Title: Sgt.
Dated Completed: JAN 18 1996
Division Head Approved: Signature /s/ Title: Capt
Returned Date to Inmate: JAN 23 1996

F. If dissatisfied, explain reasons for requesting a Second-Level Review, and submit to Institution or Parole Region Appeals Coordinator within 15 days of receipt of response.

I am effectively being denied access to the courts at this point, I believe this is illegal and in contravention of my limited civil rights. Please grant me ETO or Re-assign me to a PM assignment.

Signature: /s/ H-08519 Dated Submitted: 2-1-96

Second Level ___ Granted _X_ P. Granted ___ Denied
___ Other

G. REVIEWER'S ACTION (Complete within 10 working days): Date assigned: FEB 08 1996 Due Date: _____
___ See Attached Letter

Signature: /s/ Dated Completed: FEB 16 1996
J.C. WALKLEY, AWP(A)
Warden/Superintendent Signature: /s/
T. WHITE, WARDEN
Date Returned to Inmate: FEB 19 1996

H. If dissatisfied, add data or reasons for requesting a Director's Level Review, and submit by mail to the third level within 15 days of receipt of response.

Signature: _____ Date Submitted: _____

For the Director's Review, submit all documents to:

Director of Corrections
P.O. Box 942883
Sacramento, CA 94283-0001
Attn: Chief, Inmate Appeals

DIRECTOR'S ACTION: ___ Granted ___ P. Granted
___ Denied ___ Other
___ See Attached Letter

Date: _____

Inmate Appeal Continued

incidently are also my assigned RDO's. The library closes at about 1:45 p.m. during it's open days of the week, and this inmate is not permitted to be relieved from duty until 1:30 p.m. I have no reasonable access to the law library. I have discussed this problem with c/o Fender who supervises me, and he advises me that he can not relieve me from duty to go to the library regardless of the circumstances.

I asked that I be granted use of (ETO) in accord to section 3045.2 (2)(G)(5) of the title 15, which indicates that (ETO) may be used for "non-routine recreation and entertainment activities" and c/o Fender denied me that request.

This inmate can not get a PLU status without filing the proper documents to the court and, I can not file the proper documents to the court without reasonable access to the law library for required case law, points and authorities.

I have tried to convieniently resolve this situation in several ways before taking this action:

(1) I have asked and talked to c/o Fender, my supervisor.

(2) I have written the law librarian and asked for PLU status as a result of my sitution, to which I never received a response.

(3) I also submitted a Job Change application which was approved over a month ago but never occurred for reasons unknown.

To Second Level

My supervisor says that he can not grant me ETO for use of the access to law library however, in accord to the above cited title 15 section the lieutenant and higher authority can. I would request that it be granted of me so that I can get my legal business handled and still conform to CDC's programming of continuing to work my assignment. If I can not be granted ETO, please unassign me from this position to A-1-A unassigned or change me to a

SUPPLEMENT PAGE

RE: California State Prison-Sacramento (SAC)
Second Level Reviewer's Response
Appeal Log #: SAC-C-95-03353
Date: February 8, 1996

Inmate: Chavis, H-085159

/s/
FEB 16 1996

APPEAL ISSUE: (Modified)
Legal

APPEAL DECISION:

PARTIALLY GRANTED (MODIFICATION ORDER)

APPEAL RESPONSE

K. L. Markey, Appeals Coordinator, was assigned to investigate your appeal at the Second Level of Review.

All submitted documentation and supporting arguments have been considered, including the interview conducted at the First Level of Review (FLR). Additionally, a thorough investigation has been conducted regarding the claim presented by you and evaluated in accordance with SAC's Operational Procedures (OP's) and the California Code of / Regulations (CCR), Title 15.

SUMMARY OF APPEAL

You contend that you wish to utilize Excused Time Off (ETO) to go to the Law Library, or you wish to receive a job change to a Third Watch position in order to accommodate your Law Library access.

SUMMARY OF INVESTIGATION

The Department's rule regarding use of ETO is contained in the California Code of Regulations (CCR), Title 15, Section 3045.2.

The First Level Reviewer has informed you that the use of ETO does not include an inmate's desire to utilize the Law Library. However, you will be referred to the Unit Classification Committee (UCC) who shall review your job assignment, and make a determination concerning your placement in a Third Watch work position.

CALIFORNIA STATE PRISON - SACRAMENTO
APPEAL LOG # SAC-C-95-03353
CHAVIS, H-08159
February 8, 1996
Page 2

APPEAL RESPONSE

For the reasons cited above, your appeal is **PARTIALLY GRANTED**. The Appeal's Office will prepare a **MODIFICATION ORDER** instructing the C-Facility Captain to have you appear before the Unit Classification Committee (UCC). UCC will determine whether you can be assigned to a Third Watch work position to accommodate your needs for use of the Law Library.

/s/
THEO WHITE
Warden

TW:km
cc: Inmate Appeals Unit
Central File

State of California

MEMORANDUM

Date: January 12, 1996

To: Inmate Chavis (H-08159)

From: California State Prison-Sacramento, Represa 95671

Subject: APPEAL LOG # SAC-C-95-03353 (FIRST LEVEL RESPONSE)

SUMMARY OF APPEAL

You wish to utilize the services of the C Facility Legal Library. Unfortunately, the library hours of operation coincide with your assigned work hours. You are requesting use of ETO time during your work hours to go to the library.

SUMMARY OF INVESTIGATION

On January 12, 1996, you were interviewed and an investigation was conducted by this writer regarding the above-noted appeal. During my investigation I found that use of ETO time is not an option for you in this circumstance. California Code of Regulations, Title 15, Section #3045.2 specifies authorized use of ETO time. Access to the Legal Library is not listed, nor is it considered a "non-routine recreation and entertainment" activity, as you suggest.

You best option at this point is to request a work assignment change that would allow access to the Legal Library as a GLU.

APPEAL RESPONSE

For the reasons cited above your appeal is DENIED.

/s/
B. MCJUNKIN
Program Sergeant, 2/W
C Facility

BM:lj

RECEIVED
JAN 17 1996
CSP-SAC
APPEALS OFFICE

State of California

MEMORANDUM

FORMAL RESPONDENT c/o Fender

Date: 12-13-95

To: Inmate Chavis H-08159
(NAME) (CDC#)

From: California State Prison-Sacramento, Represa 95671

Subject: INFORMAL LEVEL APPEAL
UNIT LOG # 1295 C-921

Appeal is (indicate one) GRANTED / PARTIALLY GRANTED / **DENIED** / OTHER

On 12-14-95 you were interviewed by c/o Fender regarding the following issue(s):

You requested ETO to go to the law library.

An investigation of your complaint revealed the following:

I cannot grant ETO for you to go to the law library.

The following person(s) was/were interviewed in the course of the investigation:

_____ _____
Respondent Signature Printed Name

EXHIBIT B

California State Prison - Sacramento
Education Department

HANDBOOK GUIDE TO LIBRARY PROCEDURES

Revised in August, 2000

Developed by

D. McCargar
Senior Librarian

D. Hoffman
Supervisor of Academic Instruction

J. Bracy
Supervisor of Correctional Education Programs

HANDBOOK GUIDE TO LIBRARY PROCEDURES

A. LIBRARY SERVICE PROVIDERS

The full range of library services mandated by Department Regulations is provided by SAC Library staff, 5 days per week, and custody staff should not feel compelled to augment these services. NO ONE outside the Education Department is authorized to provide library services to inmates that have been denied by library staff, regardless of the HARD SELL they may get from the inmate. If an inmate request has been denied by the librarian, there IS a legitimate rationale for the denial. (see below.) Often the rationale for emergency library service is a court deadline. All court deadlines for incarcerated litigants have a grace period of at least 10 days, and, further, no inmate need miss a deadline due to lack of multiple copies, because the

original may be filed alone to meet any deadline. Failure to gain physical access for legal research is an unfounded complaint because the courts have approved paging as an alternative to physical access. When custody staff encounter an inmate unwilling to accept a negative response from the library, after library hours, the only action that should be taken by custody staff is to guarantee that library staff are aware of the problem early on the next library working day. The problem may then be reconsidered and/or an interview at the cell or in a block office can be scheduled with the Sr. Librarian.

Source: DOM Sections 53060, 14010.21
SAC DOM Supplements, 53060, 14010.21
CCR Title 15 3120-3122

B. PAGING SYSTEM

Paging is the alternative to physical access during a lockdown or other restrictions upon inmate movement. Inmates may request a LOAN of photocopies of any circulating materials available inside the library through the paging system, by completing a request form and sending it to the library. The paged items (limit of 3 items at a time) are then sent to the inmate at his housing for use in the cell, for up to 30 days. Additional paged items are available, 3 at a time, without limit, as long as all previously paged items have been returned first. (See attached paging request and paging example handout.)

Pickup and Delivery of Paging

Custody staff may, at their own discretion, help to speed the delivery of library services in a lockdown situation by personally delivering an inmate's request for any library service, and/or picking up same upon completion, when possible. The usual delivery and return is done via institution and facility mail runs, and usually does not take more than a

day or two. Each library has a mail slot in the respective Facility Watch Office as well as a locked box near the library entrance, and all library requests from the blocks should be placed in either receptacle, to avoid the delay of routing through the mailroom. (Only outgoing inmate legal mail to a destination off grounds or mail for another Facility should be placed in institutional mailbags.

Source: DOM Section 53060.10
SAC DOM Supplement 53060.10

C. LEGAL COPIES

The Institution has an obligation to the taxpayers of this state to avoid copying unnecessary and prohibited materials. It is the responsibility of the Sr. Librarian, under the supervision of the SAC Education Department, to ensure that no copies of prohibited materials are made at state expense. All materials submitted for copying may be closely examined, at the discretion of the Librarian, to verify exhibit materials, determine whose material is being copied, and otherwise to determine acceptability for copying.

An inmate with an acute concern for confidentiality (doesn't want anyone to read his legal documents) will be advised to seek copies off grounds or file only his original without any copies, explaining to the courts his concern and his failure to provide additional copies. This option places no liability upon the Institution in the event of loss in the mails, as examination by the librarian is fundamental to protecting the interests of the state. An inmate who will allow only the librarian to examine his confidential material, objecting to any exposure to an inmate library clerk, may request special handling by the librarian. Such a request will involve a 24 hour turnaround, with the result that the copies will not be completed the same day the request is received.

Source: SAC DOM Supplement 14010.21

1. Number of Copies

Inmates are only entitled to multiple copies of "new filings" destined for a named court in the quantity required by that court. The number of copies required by various courts for various documents is constantly updated by the Sr. Librarian, and is posted near the copier in each library (see attached, Numbers of Copies document).

Source: DOM Section 14010.21.4
SAC DOM Supplement 14010.2 1
SAC "Numbers of Copies for Legal Documents"

CSP-SAC MINIMUM CAMP
LIBRARY PAGING SERVICES

Minimum Camp inmates may request both legal and leisure reading materials from the Maximum Security (GP) Facility libraries, on temporary loan only. 2 Leisure reading books may be requested at a time, by author or title or subject for a 2 week loan period. A $5.00 fee is charged in addition to list price for any book lost or damaged.

Because law books may not be circulated, only a copy of legal materials can be paged, and the request must be very specific. Case law, statutes, department and institution regulations, and legal research handbooks may be paged in 30 page increments using a paging form, available at the watch office or your library.

1) A maximum of three (3) items, of up to 30 pages each, may be paged at a time. Once these are returned, the inmate may borrow 3 more items, over and over, as necessary. The borrowing period is 2 weeks. Be advised that a trust charge can follow you onto the streets, if necessary.

2) Inmates accepting paged legal materials will sign a trust withdrawal form in the amount of $11 for each item, the amount charged if the item is lost, damaged or returned incomplete.

3) Inmates may not keep any paged materials (state property) except blank legal and institutional forms.

4) All requests will be filled ASAP, the same day received.

5) Requests requiring legal research on the part of library staff may be returned for the inmate to simplify or explain in more detail, and will be subject to delay. Please see paging

examples below.

6) All requests must provide sufficient accurate detail to be located by library staff. If you don't know for sure what you want, if you can't accurately describe it, we won't be able to find it.

PAGING REQUEST EXAMPLES

1. **"Please send FEDERAL RULES/CIVIL PROCEDURE, 42 USCA 1983 with case law annotations"**

This request involves 2 volumes, and only the statute itself would be paged. To get any case Annotations, you must select a specific topic or subject heading, see #2 below.

2. **"Please send annotations at 42 USCA 1983"**

This request fails to indicate an area of interest, such as "good faith defense" or "length of confinement", etc. All the annotations of this section would be several hundred pages long. In this case, the library will first send a copy of the contents pages for a US Code Title & Section, with annotations listed by numbered subject areas, from which the inmate can then select his area of interest and resubmit a more specific request.

3. **"Please send Plessy v Ferguson, I don't know the cite"**

This request leaves out the "venue". The court, thus the law set in which the case is published must be named, as well as the full and CORRECTLY SPELLED case name, if the citation is unknown. A case can be found by name if spelled correctly AND the court or venue is provided. The year the case was adjudicated will also help. The more data you can provide to narrow our search for you, the faster the delivery of your paging. [correct example: Plessy v Ferguson (1989) (CA) (case)]

4. **"Please send the green book about criminal law"**

This request is inadequate. If your are doing your own legal research, you must develop good study methods. Take careful notes of the items you find of use in the library, write down the titles, section numbers, page numbers, anything and everything about any material that you may want to find again, or that you may have to ask someone else to find for you. (correct example: Author-Title)

5. **"Please send 114 S CT 2364, Heck v Humphrey"**

This request is inadequate, because the Library does not have the law set represented by "S CT", the abbreviation for West's SUPREME COURT REPORTER. Make sure your request has all parallel citations included. For Federal cases this means "L ED 2d" or just "L Ed" which are the abbreviations for SUPREME COURT REPORTS, LAWYER'S EDITION 2nd (or 1st), the federal case law set used by SAC libraries. The library can usually find the parallel citation, but it will delay your request, just as it will delay your own research in the library, since the case can ONLY be found at SAC by using the parallel citation from the Lawyer's Edition set. (correct example: Heck v Humphrey 128 Cal.2nd 620)

6. **"Please send the CALIFORNIA STATE PRISONER'S HANDBOOK"**

This request is for an entire book and cannot be filled as is. You must select a specific chapter or name a subject of interest. The contents pages of this volume and any other book may be requested first, to help you find the section or sections you need. (correct example: contents/index to same)

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Reginald Chavis v. Sylvia Garcia***
No.: **CIV S-00-2496 WBS GGH P**
I declare:
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 22,2001, I served the attached **RESPONDENT'S REPLY TO PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550, addressed as follows:

REGINALD CHAVIS
H-08159
Calipatria State Prison
P.O. Box 5002
Calipatria, CA 92233-5002

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 22,2001, at Sacramento, California.

_____
Signature

(2)

COPY

No. 04-721

IN THE SUPREME COURT OF THE UNITED STATES

MIKE EVANS, Warden, *Petitioner,*

v.

REGINALD CHAVIS, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
MARY JO GRAVES
Senior Assistant Attorney General
JANET E. NEELEY
Supervising Deputy Attorney General
STAN CROSS
Supervising Deputy Attorney General
JULIE A. HOKANS
Supervising Deputy Attorney General
CATHERINE CHATMAN
Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-53t 4
Fax: (916) 324-2960
Counsel for Petitioner

QUESTION PRESENTED

In *Carey v. Saffold*, 536 U.S. 214, 225 (2002), this Court held that, where a California prisoner "unreasonably" delays in filing a state habeas corpus petition after denial in a lower court, that application is not "'pending' during this period" and therefore does not toll the one-year statute of limitations for filing federal habeas corpus petitions. The Court further held that the California Supreme Court's denial of a habeas petition on the merits does not itself "indicate that the petition was timely." *Id.* at 226. The question presented is:

Did the Ninth Circuit contravene this Court's decision in *Carey v. Saffold* when it held that a prisoner who delayed more than three years before filing a habeas petition with the California Supreme Court did not "unreasonably" delay in filing the petition -- and therefore was entitled to tolling during that entire period -- because the California Supreme Court summarily denied the petition without comment or citation, which the Ninth Circuit construes as a denial "on the merits"?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 04-721

MIKE EVANS, Warden, *Petitioner,*

v.

REGINALD CHAVIS, *Respondent.*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) is reported as *Chavis v. LeMarque*, 382 F.3d 921 (9th Cir. 2004). Pet. App. A. The United States District Court's September 20, 2001, order adopting the findings and recommendations of the magistrate judge and granting the Warden's motion to dismiss the application for writ of habeas corpus (Pet. App. C) is unpublished.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was entered on August 27, 2004. The petition for writ of certiorari was filed on November 22, 2004, and granted on May 2, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2244(d) of Title 28 of the United States Code sets forth the following one-year statute of limitations period and tolling provision for an application for a writ of habeas corpus by a state prisoner held in custody pursuant to the judgment of a state court:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes a one-year statute of limitations for state prisoners seeking habeas relief in federal courts. 28 U.S.C. § 2244(d)(1). This period of limitation was intended to address the problem of delay in seeking federal habeas review and thereby protect society's interest in the finality of judgments.

Duncan v. Walker, 533 U.S. 167, 179 (2001). To accommodate concerns of comity by affording the states the first opportunity to resolve federal constitutional claims arising from their judgments, the period of limitation is tolled while a prisoner is making proper use of his or her state's established procedures for collateral review. 28 U.S.C. § 2244(d)(2); *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999).

This Court has held that a prisoner who does not comply with state timeliness standards while pursuing collateral review in state court loses the benefit of the tolling provision. *Pace v. DiGuglielmo*, 125 S. Ct. 1807, 1812 (2005); *Carey v. Saffold*, 536 U.S. 214, 225-26 (2002). In the decision below, the Ninth Circuit refused to follow this Court's instructions to determine whether a state petition for habeas corpus was timely filed before finding that it was "pending" during a three-year period of inactivity between denial by a lower court and filing at the next level. Instead, the Ninth Circuit simply applied its own conclusive presumption: all petitions summarily denied by the state court without explanation are timely filed and toll the limitations period, no matter how lengthy the delay. The Ninth Circuit's decision disregards this Court's decision in *Saffold*, disregards California state law governing the timeliness of habeas petitions, and undermines the AEDPA limitations period.

A. California's Habeas Corpus Scheme

In California, prisoners seeking to bring collateral challenges to their convictions do so by filing a petition for writ of habeas corpus. Cal. Penal Code §§ 1473, 1474; *People v. Duvall*, 886 P.2d 1252, 1258 (Cal. 1995); *People v. Romero*, 883 P.2d 388, 391 (Cal. 1994). The California Constitution grants original jurisdiction in habeas corpus proceedings to "[t]he Supreme Court, courts of appeal, superior courts, and their judges."[1/] Cal. Const., art. VI, § 10; *Romero*, 883 P.2d at

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1. After denial of habeas relief by the Court of Appeal, a California

391.

The habeas corpus petition "must be filed within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *In re Harris*, 855 P.2d 391, 398 n.7 (Cal. 1993). The petitioner bears the burden of establishing the absence of substantial delay, or good cause for the delay, or that the case comes within one of the exceptions to imposition of the procedural bar of untimeliness identified in *In re Clark*, 855 P.2d 729, 760-61 (Cal. 1993).

A petitioner proceeding in pro se must use a form approved by the California Judicial Council. Cal. Rules of Court, rule 4.551. The form leads a petitioner through all the requirements for stating his or her grounds for relief. California Judicial Council Forms, form MC-275, *available at* http://www.courtinfo.ca.gov/cgi-bin/forms.cgi. In particular, question 15 of the form instructs the petitioner to "[e]xplain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304)" and provides space for a response. *See* J.A. 20. The petition need not be served on the respondent. *Clark*, 855 P.2d at 761 n.36.

When a California appellate court first considers a habeas petition, "[u]nless a procedural bar is apparent, the court will determine whether the petition states a prima facie case for relief, i.e., whether it states facts which, if true, entitle the petitioner to relief." *Clark*, 855 P.2d at 741 n.9; *accord*, *Duvall*, 886 P.2d at 1258. "If no prima facie case for relief is stated, the court will summarily deny the petition." *Duvall*, 886 P.2d at 1258; *accord*, *Clark*, 855 P.2d at 749. Similarly, if a

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prisoner may seek review in the California Supreme Court either by filing an original petition for writ of habeas corpus or "preferably" by filing a petition for review in the California Supreme Court within ten days. *In re Reed*, 663 P.2d 216, 217 n.2 (Cal. 1983), *overruled on another ground by In re Alva*, 92 P.3d 311, 312 (Cal. 2004); *see* Cal. Penal Code § 1506; Cal. Rules of Court, rule 28(e)(1).

procedural bar is "apparent," the court will issue a summary denial. *Clark*, 855 P.2d at 741 n.9; *accord*, *Romero*, 883 P.2d at 391. California law does not require a statement of reasons for such a denial. *In re Mazoros*, 142 Cal. Rptr. 609, 610 (Cal. Ct. App. 1977); *see* Cal. Const, art. VI, § 14.

If the appellate court's "preliminary assessment" is that the petitioner would be entitled to relief if his factual allegations are proved, the court either grants the writ or issues an order to show cause why relief should not be granted.[2] *Duvall*, 886 P.2d at 1258-59. This "institute[s] a proceeding in which issues of fact are to be framed and decided." *Romero*, 883 P.2d at 393 (quoting *Hochberg*, 471 P.2d at 5 n.4). Once the order to show cause or writ issues, the custodian must have an opportunity to respond, and the court must resolve the case "in writing with reasons stated." *Id.* (quoting Cal. Const., art. VI, § 14).

The respondent custodian files a "responsive pleading, called a return, justifying the confinement." *Duvall*, 886 P.2d at 1259. The petitioner responds to the return in a pleading called a "traverse." *Id.* at 1260. Through the return and the traverse "both factual and legal issues are joined for review." *Id.* at 1261; *accord*, *Romero*, 883 P.2d at 392.

If the court finds that there are material facts in dispute, it will order an evidentiary hearing. *Duvall*, 886 P.2d at 1261; *Romero*, 883 P.2d at 393. If there are no disputed factual issues as to matters outside the record, the court decides the merits without a hearing. *Duvall*, 886 P.2d at 1261.

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2. California statutes relating to habeas corpus provide that the writ should be granted and the custodian commanded to "have the body of such person before the court or judge" when the petition states a prima facie case. Cal. Penal Code §§ 1476, 1477. Because the appellate courts are not well-suited for having prisoners brought before them or for conducting evidentiary hearings, in most cases the courts will instead utilize the practice of ordering the custodian to show cause why the relief sought should not be granted. *Clark*, 855 P.2d at 743 n.10; *In re Hochberg*, 471 P.2d 1, 4 n.2 (Cal. 1970).

B. State Court Proceedings

Respondent Reginald Chavis was found guilty in California state court on July 29, 1991, of attempted murder and mayhem with related findings of firearm use and great bodily injury. Pet. App. A at 3; *see also* Exh. B to Petition for Writ of Habeas Corpus, filed in U.S. Dist. Ct. Aug. 30, 2000 (Federal Petition). He was sentenced to state prison for an indeterminate term of life with the possibility of parole, plus eight years for sentencing enhancements. Pet. App. D at 2; *see also* Exh. B to Federal Petition. After an unsuccessful appeal and petition for review, Chavis's conviction became final on January 26, 1993. Pet. App. D at 4.

Chavis filed his first state petition for writ of habeas corpus in the Sacramento County Superior Court on May 14, 1993, and it was denied by the court on July 30, 1993. Pet. App. A at 4. On August 22, 1994, he filed a petition for writ of habeas corpus with the California Court of Appeal, which was summarily denied without comment on September 29, 1994. *Id.* at 5.

More than three years later, on November 10, 1997, Chavis filed a petition for writ of habeas corpus in the California Supreme Court, presenting the same claims plus one new subclaim for his claim of ineffective assistance of trial counsel.[3] *Id.*; Pet. App. F at 1. It is this state habeas petition that lies at the center of the instant dispute. On April 29, 1998, the California Supreme Court summarily denied the petition through an order stating, in its entirety, "Petition for writ of habeas corpus is denied." J.A. 32; Pet. App. A at 5.

Chavis then embarked on a second round of unsuccessful state filings. He filed a habeas petition with the Sacramento

3. Chavis added an argument that counsel failed to object to amendment of the information to allege that Chavis personally used a firearm, subjecting him to enhanced punishment under California Penal Code section 12022.5(a), despite Chavis's expressed concern. Pet. App. F at 1.

County Superior Court on December 15, 1998, his second in that court, but the court ordered that petition "not filed" because Chavis had not properly filled out the appropriate forms. Pet. App. A at 5. On January 25, 1999, he refiled his second habeas petition with the superior court, which denied the petition on February 24, 1999. *Id.* Chavis then filed his second habeas petition with the California Supreme Court on December 17, 1999. *Id.* The petition was denied on March 29, 2000. J.A. 33.

C. Federal District Court Proceedings

On August 30, 2000, Chavis filed his federal petition for a writ of habeas corpus. Pet. App. A at 6. The magistrate judge issued findings and recommended that Chavis's federal habeas petition be denied as barred by the AEDPA statute of limitations. *Id.* The district court adopted the findings and recommendation, and dismissed the petition. *Id.*

D. The Decision Below

The Ninth Circuit reversed. The court found that the one-year limitations period was not tolled for a total of 363 days and that Chavis's petition was therefore timely with two days to spare. Pet. App. A at 11-12.

As noted, Chavis let more than three years pass between the California Court of Appeal's denial of his habeas petition and filing a petition presenting essentially the same claims in the California Supreme Court. Accordingly, contended the Warden, Chavis had unreasonably delayed in seeking relief from the California Supreme Court and thus did not have a state application for state collateral review "pending" for the period of more than three years prior to that filing. In the absence of tolling for this period, the additional days in which the limitations period ran pushed Chavis well outside the one-year limitations period.

The Ninth Circuit ruled, however, that Chavis was entitled to statutory tolling throughout his entire first round of state petitions, including the entire three-year period of inactivity

between the California Court of Appeal's denial of the petition and the filing of the next petition in the California Supreme Court. Pet. App. A at 9. The court therefore found that the limitations period had run for only 363 days and thus had not expired. *Id.* at 12.

The Ninth Circuit recognized that, according to this Court's decision in *Saffold*, Chavis's petition could not be considered "pending" during the three-year interval before the California Supreme Court petition was filed if Chavis had unreasonably delayed in filing it. *Id.* at 8 (citing *Saffold*, 536 U.S. at 223, 225). The Ninth Circuit, however, refused to determine whether the three-year delay constituted unreasonable delay under state law and thereby failed to toll the AEDPA limitations period. *Id.* at 9. Thus, the court did not apply the standard for timeliness set out by the California Supreme Court in *Harris*, under which a state habeas petition is timely if it is "filed within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *Harris*, 855 P.2d at 398 n.7.

Instead, the Ninth Circuit asserted that "the only relevant inquiry is whether the state court denied the petition as untimely." Pet. App. A at 9. In this case, the California Supreme Court disposed of Chavis's petition by issuing a summary denial without comment or citation. *Id.*; J.A. 32. The Ninth Circuit observed that "[w]hen the California Supreme Court denies a habeas petition without comment or citation, we have long treated the denial as a decision on the merits." Pet. App. A at 9. The court concluded that "because Chavis's November 1997 habeas petition to the California Supreme Court was denied on the merits, it was pending during the interval between the Court of Appeal decision and the Supreme Court petition and he is entitled to tolling." *Id.* The court did not explain how this approach could be reconciled with the holding in *Saffold*, 536 U.S. at 225-26, that a denial on the merits does not, in and of itself, indicate that a state habeas

petition was timely filed. The court merely cited the Ninth Circuit's decision on remand in *Saffold*, which did not provide such an explanation either. *Id.* (citing *Saffold v. Carey*, 312 F.3d 1031, 1034-36 (9th Cir. 2002)).

SUMMARY OF ARGUMENT

AEDPA places a statute of limitations on the filing of petitions for writs of habeas corpus by state prisoners. More specifically, petitions filed by prisoners challenging non-capital state convictions or sentences must be filed within one year from the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. 28 U.S.C. § 2244(d)(1)(A). Congress included the limitations period to "curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." *Williams v. Taylor*, 529 U.S. 362, 386 (2000) (opinion of Stevens, J.); *see also id.* at 404 (majority opinion). To give the states a full opportunity to correct constitutional errors in their judgments, AEDPA provides that the limitations period is tolled while the prisoner is pursuing state collateral review. The AEDPA limitations period and tolling provision were crafted to achieve a balance that "'promotes the exhaustion of state remedies while respecting the interest in the finality of state court judgments.'" *Saffold*, 536 U.S. at 220 (quoting *Duncan*, 533 U.S. at 178). Of course, if a prisoner does not make proper use of state procedures in pursuing collateral relief, the balance struck in AEDPA is upset. In particular, if a prisoner fails to comply with state timeliness requirements, exhaustion is accomplished at the expense of the interest in finality.

According to this Court's decision in *Saffold*, a prisoner will receive statutory tolling for the intervals between denial of relief by a lower court and application to a higher court, as well as while the application is under consideration by the court, but only if the prisoner complies with state timeliness requirements in proceeding from the lower court to the higher court. *Saffold*,

536 U.S. at 225. In California, this means the federal court must decide whether the prisoner filed in the higher court without unreasonable delay. *Id.*; *see Harris*, 855 P.2d at 398 n.7.

Contrary to *Saffold*, the Ninth Circuit has framed the "relevant inquiry" in determining statutory tolling during the intervals as "whether the state court denied the petition as untimely." Pet. App. A at 9. If not, the Ninth Circuit presumes that the decision was on the merits and that the petition was timely filed. *Id.* The Ninth Circuit therefore grants statutory tolling for the interval preceding the filing, no matter how lengthy.

This conflicts with this Court's decision in *Saffold*. This Court made it clear that a state court's decision on the merits, whether explicit or presumed, does not in and of itself establish that the state court petition was timely filed. *Saffold*, 536 U.S. at 225-26. As this Court explained, "A court will sometimes address the merits of a claim that it believes was presented in an untimely way. . . ." *Id.* at 225.

Moreover, the Ninth Circuit failed to consider whether its presumption of timeliness would reach the correct result in most cases. Had it examined California practice, it would have found that most state petitions for writ of habeas corpus are summarily denied by the appellate courts without timeliness findings or any other explanation. This is because California appellate courts make a preliminary assessment of the petition, and "[i]f the court determines that the petition does not state a prima facie case for relief or that the claims are all procedurally barred," the court will issue a "summary denial." *Romero*, 883 P.2d at 391. No statement of reasons is required. Accordingly, many petitions can be, and are, denied without the court ever even reaching the question of timeliness because they do not present a prima facie case. If, on the other hand, the petition survives the court's preliminary assessment, an adversary proceeding begins, the parties file pleadings, and relief will not be granted if the petition was untimely. The Ninth Circuit therefore misunderstands California practice when it presumes that a summary denial indicates that the state petition was timely filed.

The result of the Ninth Circuit's opinion in *Chavis* is that thousands of California state habeas petitions must be considered timely by the federal district court and all will receive statutory tolling for the period preceding their filing, no matter how lengthy a period that might be and "even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts." *Saffold*, 536 U.S. at 226.

To avoid this subversion of the AEDPA limitations period, the federal courts must determine for themselves whether a summarily-denied state habeas petition was timely filed before allowing statutory tolling for the intervals between filings. This does not interfere with California state court decisions, but actually respects California law and practice. Nor will this mire the federal courts in difficult state law inquiries. Although California's timeliness standard is indeterminate, its requirements of reasonableness and due diligence are common concepts in the law in general and in federal habeas practice in particular. A California petitioner bears the burden of pleading and proving timeliness in the state court petition. And the Attorney General can lodge the state court documents, direct the federal court's attention to the relevant dates and facts, and make an argument regarding timeliness where appropriate.

ARGUMENT

THE ONE-YEAR LIMITATIONS PERIOD APPLICABLE TO RESPONDENT'S FEDERAL HABEAS CORPUS PETITION WAS NOT TOLLED DURING THE THREE YEARS THAT PASSED BEFORE HE FILED HIS FIRST HABEAS PETITION WITH THE CALIFORNIA SUPREME COURT

A. *Carey v. Saffold* Held That AEDPA's One-Year Limitations Period Is Not Tolled By The Filing Of An Untimely Application For State Collateral Review And That A Federal Court Should Not Conclude That A California State Court Found A Habeas Petition To Be Timely Merely Because It Denied The Petition On The Merits

The tolling provision of the AEDPA one-year statute of limitations provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation . . . ." 28 U.S.C. § 2244(d)(2). This tolling provision "balances the interests served by the exhaustion requirement and the limitations period." *Duncan*, 533 U.S. at 179 (quoted in *Rhines v. Weber*, 125 S. Ct. 1528, 1534 (2005)). It promotes the exhaustion of state remedies, the concern of subdivision (b)(1)(A) of section 2254, by preserving a prisoner's right to seek relief in federal court after exhausting state remedies. At the same time, the tolling provision accommodates the states' interest in finality, the concern of subdivision (1) of section 2244(d), by permitting tolling "only" while a "'properly filed application for State post-conviction or other collateral review . . . is pending.'" *Duncan*, 533 U.S. at 179 (quoting 28 U.S.C. § 2244(d)(2)). The result is that petitioners will receive the benefit of continuous statutory tolling while invoking one full round of the state's collateral review scheme, so long as they properly pursue state remedies.

1. Statutory Tolling Is Allowed Only For The Proper Use Of State Collateral Remedies

Tolling begins when an application for state collateral relief is "properly filed." "An application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). A state's "time limits, no matter their form, are 'filing' conditions." *Pace*, 125 S. Ct. at 1814.

Therefore, if a state court has rejected an application for collateral relief as untimely, "that [is] the end of the matter," there is no tolling. *Id.* at 1812 (quoting *Saffold*, 536 U.S. at 226); *see also Pace*, 125 S. Ct. at 1814. If the state court has not rejected an untimely petition as improperly filed under state law, the AEDPA period of limitation is tolled beginning on the day of its filing.

A properly filed application for state collateral review is, of course, "pending" and tolls the period of limitation while under consideration by the court. In *Saffold*, this Court considered whether an application could also be pending, as that word is used in the AEDPA tolling provision, during the intervals between a lower state court's denial of an application for collateral review and the filing of a notice of appeal to a higher state court, permitting tolling for that period of time as well. *Saffold*, 536 U.S. at 216-23.

The Court held that, generally, a state prisoner's application for habeas corpus relief is pending "as long as the ordinary state collateral review process is 'in continuance' -- i.e., 'until the completion of' that process.'" *Id.* at 219-20 (quoting Webster's Int'l Dict. 1669 (1993)). "In other words, until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains 'pending.'" *Id.* at 220 (quoting 28 U.S.C. § 2244(d)(2)). An application may therefore be pending during the time between a lower state court's denial of an application for collateral review and the filing of a notice of appeal to a higher state court, as well as while it is under consideration, providing the possibility of continuous statutory tolling. In California's collateral review system, this means that a petitioner may receive the benefit of tolling during the period between denial of state habeas relief by a lower court and the filing of an original state habeas petition at the next level. *Id.* at 223.

Having resolved this threshold issue, this Court turned to the question presented in California's petition for writ of certiorari: Whether an application for state collateral review is

"pending" when the application filed in the state appellate court is untimely. This Court answered "no"; an untimely application for state collateral review is not "pending" during the period of delay. *Id.* at 225; *see id.* at 223; *see also Pace*, 125 S. Ct. at 1812, 1814. The one-year limitations period for filing federal habeas corpus petitions set forth in 28 U.S.C. § 2244(d) is therefore not tolled for that interval. *Saffold*, 536 U.S. at 225.

2. Timeliness Is Not Established By A State Court's Summary Denial On The Merits

Turning to Saffold's case, this Court held that the Ninth Circuit erred in relying on the fact that the California Supreme Court denied Saffold's petition "on the merits and for lack of diligence." *Saffold*, 536 U.S. at 226. The Ninth Circuit had reasoned that Saffold's petition had to have been timely filed because the phrase "on the merits" showed that the state court had considered the merits. *Id.* This Court disagreed, explaining that there are many reasons why a state court "will sometimes address the merits of a claim that it believes was presented in an untimely way." *Id.* Accordingly, "[g]iven the variety of reasons why the California Supreme Court may have included the words 'on the merits,' those words cannot by themselves indicate that the petition was timely." *Id.* at 226. The Court added that:

> [T]he Ninth Circuit's apparent willingness to take such words as an absolute bellwether risks the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts. *See, e.g., Welch v. Newland*, 267 F.3d 1013 (C.A.9 2001) (finding limitations period tolled during 4-year gap).

Id. This Court therefore vacated the Ninth Circuit's judgment and remanded the case so that the Ninth Circuit could reconsider whether Saffold's state court petition was timely. *Id.* at 226-27.

B. Under *Carey v. Saffold*, A Habeas Petition Summarily Denied By A California Appellate Court Should Not Automatically Be Deemed Timely-Filed And, Therefore, Should Not Automatically Toll The AEDPA Limitations Period

Now we reach the issue in this case: what if the state court order is silent as to the reasons for the denial? Must the federal court determine for itself whether the application was timely under state law before granting tolling? The Ninth Circuit believes that it need not do so, and that the petitioner gets tolling for the preceding interval. But this cannot be reconciled with *Saffold* or with actual practice.

1. *Saffold* Teaches That, Where A State Court Does Not Expressly Address The Timeliness Of A Habeas Petition, The Federal Court Must Independently Determine Whether The State Petition Was Timely Filed

It is clear from this Court's opinion in *Saffold* that its holding applies whether the state court denial of habeas relief was "on the merits and for lack of diligence," as in *Saffold*, 536 U.S. at 225, or unexplained, as in the present case. As this Court observed in *Saffold*, the AEDPA tolling provision gives states "the opportunity to complete one full round of review, free of federal interference. Inclusion of California's reasonableness periods carries out that purpose in the same way, and to the same degree, as does inclusion of the more specific appellate filing periods prevalent in other states." *Id.* at 222-23. It follows that allowing tolling for the intervals serves no purpose if the petitioner fails to file within the state's time requirements.

This is why, having concluded that a state habeas petition may be pending during the intervals between a lower court decision and filing in a higher court, *id.* at 223, this Court identified the pertinent question as "whether Saffold delayed

'unreasonably' in seeking California Supreme Court review. If so, his application would no longer have been 'pending' during this period." *Id.* at 225. This constitutes a clear instruction to the federal courts to look to and apply state timeliness standards. In no way does it suggest that a federal court should simply grant tolling for the preceding interval as long as the state court did not explicitly deny the petition for delay. The Ninth Circuit was therefore quite wrong to frame the pertinent question in the present case as whether the state court expressly denied the petition as untimely. *See* Pet. App. A at 9.

This Court recognized in *Saffold* that California law applies a general reasonableness standard rather than precise time limits for seeking collateral review. *Saffold*, 536 U.S. at 221-22. The Court went on to say that "[t]he fact that California's timeliness standard is general rather than precise may make it more difficult for federal courts to determine just when a review application (i.e., a filing in a higher court) comes too late." *Id.* at 223. This can only mean that this Court contemplated that the federal courts would determine for themselves whether a state application was timely in the absence of a clear ruling from the state court.

In remanding to the Ninth Circuit to perform this very task, this Court held that the Ninth Circuit had erred in avoiding the question of unreasonable delay. *Saffold*, 536 U.S. at 226. The California Supreme Court had denied Saffold's petition "on the merits and for lack of diligence." *Id.* at 225-26. The Ninth Circuit had reasoned that the petition had to have been timely filed because the phrase "on the merits" showed that the state court had considered the merits. *Id.* at 225. This Court explained why that reasoning was flawed, and why a denial on the merits does not compel a conclusion that the petition was timely filed:

> A court will sometimes address the merits of a claim that it believes was presented in an untimely way: for instance, where the merits present no difficult issue; where the court wants to give a reviewing court alternative grounds for decision; or where the court wishes to show a prisoner (who may not have a lawyer) that it was not merely a procedural technicality that precluded him from obtaining relief. Given the variety of reasons why the California Supreme Court may have included the words "on the merits," those words cannot by themselves indicate that the petition was timely. And the Ninth Circuit's apparent willingness to take such words as an absolute bellwether risks the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts. *See, e.g., Welch v. Newland*, 267 F.3d 1013 (finding limitations period tolled during 4-year gap). The Ninth Circuit's rule consequently threatens to undermine the statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims.

Id. at 225-26.

This reasoning applies with equal force to a summary unexplained disposition that only impliedly denies a petition "on the merits." The explicit wording of this Court was that "those words ['on the merits'] cannot by themselves indicate that the petition was timely." *Id.* at 226. If an explicit ruling on the merits (such as the ruling in Saffold's case) cannot be taken as an "absolute bellwether" of timeliness, it follows a fortiori that an implied or presumed ruling on the merits (such as the ruling on Chavis's petition) cannot either.

The absence of a specific finding of untimeliness in the state court order therefore does not take this case outside the holding of *Saffold*. This is further confirmed in the above-quoted passage by this Court's reference to, and implicit criticism of, the Ninth Circuit's decision in *Welch v. Newland*, 267 F.3d 1013 (9th Cir. 2001) [hereinafter *Welch*], *vacated by Welch v. Carey*, 341 F.3d 869 (9th Cir. 2003) (granting

rehearing en banc). In *Welch*, the Ninth Circuit considered a petition filed in the California Supreme Court four years and five months after denial by the lower court. *Welch*, 267 F.3d at 1015. The petition was denied by the California Supreme Court without comment or citation, just as in this case. *Id.* The Ninth Circuit allowed tolling for the four-year gap "[b]ecause the California Supreme Court had addressed the petitioner's claim on the merits." *Id.* at 1017. In *Saffold*, this Court quite correctly referred to *Welch* as an example of how the Ninth Circuit's reliance on a merits determination "risks the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts." *Saffold*, 536 U.S. at 226. Under the Ninth Circuit's reasoning in *Chavis*, however, Welch's habeas petition filed in the California Supreme Court after a delay of four years and five months would have to be considered timely.[4/]

This case, like *Welch*, "threatens to undermine the statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." *Saffold*, 536 U.S. at 226. This Court's reference to *Welch* in *Saffold* would have been meaningless had the Court intended its ruling to apply only where a state court denied a petition expressly "on the merits" *and* "for lack of diligence."

Finally, the dissent in *Saffold* understood that the majority's decision meant that federal courts would have to decide the issue of timeliness to apply the AEDPA tolling provision even in the absence of a state court finding. The dissent correctly noted that "[w]hile there may be cases, like this

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4. Ultimately *Welch* was vacated by an en banc panel of the Ninth Circuit, which disallowed tolling for the period of four years and five months, on the ground that, by dropping his original claim, Welch had abandoned his first full round of review and had initiated a new round. *Welch v. Carey*, 350 F.3d 1079, 1082 (9th Cir. 2003) (en banc). The en banc panel therefore did not decide whether the four-year gap, followed by a summary denial without comment or citation, resulted in an untimely filing. *See id.* at 1083-84.

one, where the California courts expressly deny a petition for lack of diligence, the California courts routinely deny petitions filed after lengthy delays without making specific findings of undue delay." *Id.* at 235 (Kennedy, J., dissenting). The dissent pointed out that, under the majority's decision, "federal courts will be required to assess" timeliness in those cases as well. *Id.*

In this case, the Ninth Circuit actually recognized that "[t]he *Saffold* Court held that a petition is considered pending during such intervals unless the petitioner unreasonably delayed filing a new petition at a higher level." Pet. App. A at 8. Indeed, the court agreed with the Warden that *Saffold* applied to the question of whether Chavis's petition was pending between filings. *Id.* And of course, it had to be readily apparent that the three years that Chavis allowed to slip by between the California Court of Appeal's order and filing in the California Supreme Court probably was unreasonable -- but the court did not reach the question.

Instead of following this Court's decision in *Saffold*, the Ninth Circuit relied on its own presumption that the California court's unexplained denial was a denial on the merits to conclude that Chavis's petition was timely filed despite a three-year period of inactivity. But this Court had expressly stated in *Saffold* that such a rule "risks tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts." *Saffold*, 536 U.S. at 226. The decision below is, on its face, in direct conflict with this Court's decision in *Saffold*.

2. Summary Denial Of A Habeas Petition By A California Appellate Court Does Not Indicate, One Way Or The Other, The Court's View On Whether The Petition Was Timely Filed

"[F]or purposes of applying a federal statute that interacts with state procedural rules" the federal court should "look to how a state procedure functions. . . ." *Saffold*, 536 U.S. at 223. When state practice is examined, it is plain that this Court was

correct to instruct the federal courts that a state court's summary denial on the merits does not establish that the application for collateral review was timely under state law.

a. Under California Practice, A Summary Denial Often Issues Without The Court Reaching The Issue Of Timeliness

Under California state habeas procedure, as described in the Statement of the Case, the appellate courts are led to consider *two* questions as a threshold matter: whether a procedural bar is "apparent," and whether the petition states a prima facie case for relief. The petition may be summarily denied based on *either* one or the other ground: "[i]f the court determines that the petition does not state a prima facie case for relief *or* that the claims are all procedurally barred, the court will deny the petition outright, such dispositions being commonly referred to as 'summary denials.'" *Romero*, 883 P.2d at 391 (emphasis added). The state appellate court can therefore act both expeditiously and fairly by first considering the issue that can most easily be resolved from the information before it. Accordingly, many petitions can be, and are, denied because they do not present a prima facie case without the court ever even reaching the question of timeliness. This is why the Ninth Circuit is wrong to say that "the relevant inquiry is whether the state court denied the petition as untimely." Pet. App. A at 9. And this is why the Ninth Circuit cannot simply presume that an unexplained summary denial indicates that the state habeas petition was necessarily timely filed.

This practice of making a preliminary assessment of the petition is actually very similar to the preliminary review of a petition for writ of habeas corpus conducted by the federal courts under Rule 4 of the Rules Governing Section 2254 Cases. Under that rule, "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition . . . ." As in California practice, the rule permits the court to "screen out

frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." Advisory Committee's Note on Rule 4 of the Rules Governing Section 2254 Cases; *see also Mayle v. Felix*, 125 S. Ct. 2562, 2570 (2005). The rule plainly permits the federal district court to summarily dismiss a petition for failure to make a prima facie case for relief. Advisory Committee's Note on Rule 4 (the petition must "state facts that point to a real possibility of constitutional error" to avoid dismissal). Yet no one could seriously contend that dismissal under Rule 4 establishes that the federal petition was timely filed.

In actual practice, there are several reasons why California appellate courts may in fact not decide the issue of timeliness at the stage before a summary denial issues. First, there has not yet been an adversarial process in which issues are identified and argued. California law does not require that the petition be served on the respondent warden. *Clark*, 855 P.2d at 762 n.36. As the California Supreme Court recognizes, "[T]he burden on respondents to reply to the several thousand delayed and successive petitions filed each year in this court, the courts of appeal, and the superior eourts would be intolerable." *Id.* (noting statistics from 1990-1991). The respondent warden files a pleading *only* if the court has found that the petitioner has made a prima facie case for relief and issues an order to show cause.[5] Then, of course, the respondent will raise and argue the issue of timeliness to the court, if appropriate.

Second, often it will simply be easier to first examine

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5. Prior to issuing either a summary denial or an order to show cause, California rules permit the appellate courts to request that the respondent provide an informal response. *Romero*, 883 P.2d at 394; Cal. Rules of Court, rule 60. The informal response is not a pleading and only serves a "screening function" for the court. *Romero*, 883 P.2d at 394. Through the informal response, the respondent may demonstrate that the petition should be summarily denied, thereby saving judicial resources. *Id.*; *Durdines v. Superior Court*, 90 Cal. Rptr. 2d 217, 222 & n.10 (Cal. Ct. App. 1999).

whether the petitioner has made a prima facie case. As noted before, California's timeliness standard is indeterminate and there are several exceptions to the bar of untimeliness that require a fact-intensive inquiry. The habeas corpus petition "must be filed within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *Harris*, 855 P.2d at 398 n.7. The petitioner "must explain and justify any substantial delay in presenting a claim." *Clark*, 855 P.2d at 750 (citing *In re Swain*, 209 P.2d 793, 795 (Cal. 1949)); *see also In re Sanders*, 981 P.2d 1038, 1042, 1054 (Cal. 1999). Untimeliness itself is not so difficult to ascertain; however, that does not end the inquiry for the state court because a claim that is untimely under this standard may still avoid the bar of untimeliness and be considered on the merits if it falls within one of the exceptions for a fundamental miscarriage of justice identified by *Clark*:

> (1) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (2) that the petitioner is actually innocent of the crime or crimes of which the petitioner was convicted; (3) that the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the error or omission no reasonable judge or jury would have imposed a sentence of death; or (4) that the petitioner was convicted or sentenced under an invalid statute.[6]

Clark, 855 P.2d at 760-61 (footnotes omitted); *accord*, *Sanders*, 981 P.2d at 1043. So, even if the court finds the petition untimely under California's reasonableness standard, it would

6. The first three exceptions are analyzed under state law; the fourth under federal law. *In re Robbins*, 959 P.2d 311, 318 (Cal. 1998).

then undertake to "read the petition to assure [itself] petitioner's factual allegations do not make a prima facie showing his case falls within one of the four exceptions to the timeliness requirement set forth in *Clark*" before denying the petition as procedurally barred. *Sanders*, 981 P.2d at 1044.

Also, the procedural bar of untimeliness often will not be as readily "apparent" as other procedural bars. *See Clark*, 855 P.2d at 741 n.9 ("unless a procedural bar is apparent, the court will determine whether the petition states a prima facie case" before issuing a summary denial). If a claim is barred for lack of a contemporaneous objection, for example, that will likely be stated in the superior court's denial, as the superior court is required to set forth "a brief statement of reasons" for its denial. Cal. Rules of Court, rule 4.551(g). The problem of delay, on the other hand, often arises after the superior court denial. And since the court must look at the merits of the petition to determine whether an exception to the bar of untimeliness applies, it often will be as efficient or more efficient to decide whether the petitioner has failed to make a prima facie case for relief. As this Court recognized in *Saffold*, a court may decide an application for collateral review on the merits despite untimeliness "where the merits present no difficult issue." *Saffold*, 536 U.S. at 225.

Third, the sheer numbers of habeas petitions that must be adjudicated lead California courts to make a preliminary determination based on whether the petitioner has made a prima facie case for relief. In the fiscal year 2002-2003, the California Supreme Court disposed of 2,866 original proceedings. Judicial Council of California, 2004 Court Statistics Report 9, *available at* http://www.courtinfo.ca.gov/reference/documents/csr2004.pdf. Of these, 2,849 were disposed of without opinion. *Id.* Alternative writs or orders to show cause issued in seventeen of these proceedings. *Id.* The vast majority (2,566) of the original proceedings before the court were petitions for writs of habeas corpus. *Id.* at 6. In the fiscal year 2002-2003, the California Court of Appeal disposed of 8,407 original

proceedings. *Id.* at 9. Written opinions issued in 824 of those. *Id.*

Clearly, the appellate courts must find the most efficient means of deciding these thousands of petitions. Experience having shown that it is generally easier to determine whether the petitioner has alleged specific facts that would entitle him to relief, rather than to consider whether each of the various procedural bars are present, California appellate courts would be justified in making a practice of looking for a prima facie case first in all cases. And in fact, that is exactly what the California Court of Appeal does. That court issues the vast majority of its summary denials on the basis that the petitioner failed to make a prima facie case for relief:

> The numerous petitions for writs of habeas corpus filed by inmates incarcerated for criminal convictions are a staple of the workload of an appellate court. . . . Established rules of law favor the finality of judgments. Thus, it is not easy to show that an inmate is entitled to a writ of habeas corpus, and most petitions must be denied for the failure to state a prima facie case for relief.

In re White, 18 Cal. Rptr. 3d 444, 446 (Cal. Ct. App. 2004). That court will therefore almost never indicate a procedural bar in its summary denials. How, then, can it be said that these summary denials indicate that the court found the petition timely?

Finally, there may not have been a decision on timeliness before issuance of an unexplained summary denial because the judges of the California state courts have been known to disagree on the value of analyzing whether the claims on a petition for writ of habeas corpus are procedurally barred. This Court has long understood that "sometimes the members of the court issuing an unexplained order will not themselves have agreed upon its rationale, so that the basis of the decision is not merely undiscoverable but nonexistent. . . . [M]any formulary

orders are not meant to convey *anything* as to the reason for the decision." *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). After all, "[t]he essence of unexplained orders is that they say nothing." *Id.* at 804.

In short, it is not fair or accurate to assume that a California state habeas petition denied by an unexplained summary order was timely under California law because the state habeas scheme permits -- indeed, encourages -- summary denial without reaching the question of timeliness.

b. California Enforces Timeliness Standards

All of this is not to say that California does not maintain and enforce timeliness standards. To the contrary, California courts "*insist* a litigant mounting a collateral challenge to a final criminal judgment do so in a timely fashion." *Sanders*, 981 P.2d at 1042 (emphasis added). It is only that the issue of timeliness often will not be addressed or resolved until an order to show cause issues and the actual pleadings (return and traverse) are filed.

The California Supreme Court has explained that it is highly important to the State of California for prisoners to proceed without delay to present their claims on habeas corpus, for reasons that this Court has long respected:

> [T]he writ strikes at finality. One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. "Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 [] (1989). And when a habeas petitioner succeeds in obtaining a new trial, the "'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time," *Kuhlmann v. Wilson* [(1986) 477 U.S. 436] at 453 [], prejudice the government and diminish the chances of a reliable criminal adjudication. . . .

Clark, 855 P.2d at 746 (quoting *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)). The California Supreme Court "agree[s] wholeheartedly" with Justice Harlan's observation that "'No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.'" *Harris*, 855 P.2d at 400 (quoting *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring and dissenting)). The California Supreme Court has also recognized the importance of finality to victims of crime: "[W]e cannot overestimate the value of the psychological repose that may come for the victim, or the surviving family and friends of the victim, generated by the knowledge the ordeal is finally over." *Sanders*, 981 P.2d at 1042.

California therefore has established and enforces timeliness standards: "[W]e *enforce time limits* on the filing of petitions for writs of habeas corpus in noncapital cases as well as in cases in which the death penalty has been imposed." *Id.* (citations omitted) (emphasis added); *see also Robbins*, 959 P.2d at 316.

A petitioner may very well pass the court's preliminary assessment and reach the stage in which, under California law, a "proceeding in which issues of fact are to be framed and decided" is instituted, *see Romero*, 883 P.2d at 393, even though his petition is untimely. But once he reaches that stage, California courts will not grant relief if a petitioner has delayed unreasonably in pursuing his collateral challenges and does not fall within one of the *Clark* exceptions. *Sanders*, 981 P.2d at 1042-43.

c. The California Supreme Court's Practice Of Sometimes Including A Brief Notation Of The Grounds For Its Decision Does Not Mean All Petitions Denied Without Comment Or Citation Are Timely Under California Law

The California Supreme Court has adopted a practice of sometimes including a brief notation in its summary denials indicating the grounds of its decision. *Robbins*, 959 P.2d at 340 n.34. Usually these take the form of a case citation. In 2004, the California Supreme Court issued some 1,174 summary denials (out of 2,426 habeas dispositions) that included a case citation.[7] For example, a citation to *In re Dixon*, 41 Cal.2d 756, 759 (1953) [264 P.2d 513, 514 (Cal. 1953)] indicates the court's finding that the claim is barred because it should have been raised on appeal. *Robbins*, 959 P.2d at 340 n.34. The court will also sometimes include the phrases "on the merits" and/or "for lack of diligence" in a summary order. *Id.*; *see, e.g.*, *Saffold*, 536 U.S. at 217-18. In 2004, the court included the phrase "on the merits" in about twenty summary dispositions and, in six of these, also denied the petition "for lack of diligence." *See* footnote 7. A citation to *Robbins*, 18 Cal. 4th at 780 [959 P2d at 317-18] indicates the procedural bar of untimeliness, as does a citation to *Swain*, 34 Cal. 2d at 302 or 304 [209 P.2d at 795 or 796].

In *Harris v. Superior Court*, the Ninth Circuit reasoned that, because the California Supreme Court sometimes does this, an unexplained denial indicates a decision based on the merits of the petition, and that the exhaustion requirement is thereby satisfied. *Harris v. Superior Court*, 500 F.2d 1124, 1127-28 (9th Cir. 1974). In the instant case, the Ninth Circuit seemed to leapfrog to a conclusion that an unexplained denial by the California Supreme Court not only usually reflects a denial on

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7. This information was compiled from a search of the Lexis database California State Cases, Combined (cacts) using the following query: "petition w/5 habeas w/5 (denied or denying) and date is 2004."

the merits, but also indicates that the court has considered and rejected all other bases for a denial, such as timeliness. Pet. App. A at 9; *see Hunter v. Aispuro*, 982 F.2d 344, 347-48 (9th Cir. 1992). There are several problems with applying this conclusion to a statutory tolling analysis.

First, the California Supreme Court has explained exactly when the absence of comment or citation in a summary denial may be taken to mean that the court has determined that a procedural bar does not apply:

> [W]hen respondent asserts that a particular claim or subclaim should be barred . . . or is untimely, *and* when, nevertheless, our order disposing of a habeas corpus petition does not impose the proposed bar or bars as to that claim or subclaim, this signifies that we have considered respondent's assertion and have determined that the claim or subclaim is not barred on the cited ground or grounds.

Robbins, 959 P.2d at 340 n.34 (emphasis added). As discussed above, generally the state court has not heard any argument from the respondent warden when a summary order issues. The absence of comment or citation can only have significance in the minority of cases in which the court has employed the option discussed in footnote 5 of seeking an informal response before deciding whether to deny the petition with a summary order or issue an order to show cause.[8/]

Second, even in those cases in which the Warden has filed a response and asserted untimeliness, a summary denial issued without a reference to a procedural bar or untimeliness does not necessarily establish that the court found the petition timely

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8. In *Robbins* itself, the California Supreme Court had requested an informal response. *Robbins*, 959 P.2d at 317. The case resulted in a published opinion because the court issued an order to show cause, not to consider the merits, but to provide guidance on some procedural issues including timeliness. *Id.* The claims were ultimately denied by an appended summary order. *Id.* at 317, 340.

filed. There is a distinction "between time limits and procedural bars." *Pace*, 125 S. Ct. at 1814 (citing *Artuz*, 531 U.S. at 8-10); *see also Saffold*, 536 U.S. at 225. That is, the state court may find a petition untimely, but decide not to impose the procedural bar of untimeliness.

In California, the basic timeliness requirement is that a petition be filed "within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *Harris*, 855 P.2d at 398 n.7. The petitioner "must explain and justify any substantial delay in presenting a claim." *Clark*, 855 P.2d at 750 (citing *Swain*, 209 P.2d at 795); *see also Sanders*, 981 P.2d at 1042-43, 1054. A petition that is substantially delayed without a showing of due diligence is untimely under California law. *Robbins*, 959 P.2d at 317-18; *see also Harris*, 855 P.2d at 398 n.7; *Clark*, 855 P.2d at 753; *Swain*, 209 P.2d at 795-96.

California courts will nevertheless excuse untimeliness and consider the merits if a petitioner alleges facts, which proven, would establish a fundamental miscarriage of justice. *Clark*, 855 P.2d at 760. To this end, the California Supreme Court developed the four exceptions set out in Part B(2)(a). If a petitioner demonstrates that his case falls within one of the *Clark* exceptions, it is still *untimely* under California law, but the state court will refrain from applying the *bar* of untimeliness. *Clark*, 855 P.2d at 760-61.

This Court recognized this distinction when it observed that "[a] court will sometimes address the merits of a claim that it believes was presented in an untimely way." *Saffold*, 536 U.S. at 225. And this is why, even if an unexplained court order is presumed to address the merits, that does not necessarily indicate that the petition was timely filed. In particular, the fact that the California Supreme Court has not included a citation indicating a procedural bar in a summary denial order does not support a negative inference that the court found the petition timely. It may only mean that the court excused the

untimeliness.

Third, to the extent that the absence of a comment or citation provides clues about the basis of a California Supreme Court order, such reasoning fails when applied to the California Court of Appeal. Although the California Supreme Court frequently will indicate a procedural bar in its summary orders, the California Court of Appeal generally does not. But the Ninth Circuit's broad and irrebuttable presumption applies to all California state appellate court orders.

In sum, California's state habeas scheme, similar to the federal scheme, provides for a preliminary assessment of the petition by the court. Most state habeas petitions are properly denied at this stage for failure to state a prima facie case for relief without the court reaching the issue of timeliness. These petitions are summarily denied; no statement of reasons is required under California law. The Ninth Circuit is therefore mistaken in presuming that an unexplained denial means that the state court considered the petition timely.

C. The Ninth Circuit Erred In Adopting An Irrebuttable Presumption That Habeas Petitions Summarily Denied By California Appellate Courts Were Timely Filed

A closer look at the Ninth Circuit's reasoning and comparison with this Court's federal habeas jurisprudence only confirms that the Ninth Circuit's rule regarding unexplained denials cannot stand.

The Ninth Circuit reached its result by creating its own presumption, applicable to all of the thousands of California state court unexplained orders denying habeas relief issued every year: these petitions are all timely filed and merit retroactive tolling. The presumption is sweeping and irrebuttable. It does not comport with this Court's careful and judicious use of presumptions in federal habeas review. *See Ylst*, 501 U.S. 797; *Coleman v. Thompson*, 501 U.S. 722 (1991); *Harris v. Reed*, 489 U.S. 255 (1989). While the Ninth Circuit's

presumption may serve as a rule of convenience for the federal court, it does not respect either the federal statute or California law.

1. Presumptions In Federal Habeas Cases Should Be Crafted To Reach The Correct Result In Most Cases

This Court's jurisprudence provides guidance on the limited use of presumptions in federal habeas cases. In *Coleman v. Thompson*, this Court reviewed its decision in *Harris v. Reed* and clarified the proper use of a presumption in determining whether a federal court should review the claims of a state prisoner. The problem in applying the procedural default doctrine is similar to the problem that arose in this case: it is often difficult to determine the basis of the state court decision. *Coleman*, 501 U.S. at 732; *Harris*, 489 U.S. at 262.

This Court crafted a presumption to apply as a "partial solution." *Coleman*, 501 U.S. at 732. Federal courts will

> presume that there is no independent and adequate state ground for a state court decision when the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion."

Id. at 735 (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)); *see also Harris*, 489 U.S. at 263. This is often referred to as the "*Harris* presumption."

In *Ylst v. Nunnemaker*, this Court considered a silent, unexplained California Supreme Court order. *Ylst*, 501 U.S. at 800. In that case, this Court said, the *Harris* presumption could not apply to determine whether the decision was based on procedural default or the merits because the predicate for application of the presumption was missing in that it could not be said that the state court decision fairly appeared to rest

primarily on federal law or was interwoven with federal law. *Id.* at 802. The Court created a new presumption: "[w]here there had been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Id.* at 803. The Court reasoned that this would lead to an accurate result most of the time, in that the more usual practice is for a court to affirm without further discussion when it agrees with the reasoning of the court below. *Id.* at 804. Under those circumstances, then, federal courts should presume that, where the last reasoned state court opinion on a claim imposes a procedural default, a later unexplained decision did not disregard the bar and consider the merits. *Id.* at 803.

The point is that the *Harris* and *Ylst* presumptions were created based on an analysis of what meaning could fairly be extracted from an ambiguous or unexplained state court order. And, notably, they are not broadly drawn. By setting out certain predicates and defined circumstances for their application, the Court can be confident that the presumptions will both serve judicial efficiency *and* reach the correct result in most cases.

2. California State Court Practice Provides No Support For The Ninth Circuit Presumption

The presumption promulgated by the Ninth Circuit in this case, on the other hand, was imposed arbitrarily as a rule of convenience, favors federal review without the benefit of supporting analysis, and, in any event, addresses the wrong question. In the decision below, the Ninth Circuit simply cited its decision in *Hunter v. Aispuro* for the proposition that a California state court's unexplained denial of habeas relief is conclusively presumed to be a decision on the merits, so that the claims are not procedurally barred and are subject to federal review. Pet. App. A at 9 (citing *Hunter*, 982 F.2d at 348). In *Hunter*, both the California Court of Appeal and the California Supreme Court had denied state habeas relief without explanation. *Hunter*, 982 F.2d at 347. The Ninth Circuit

recognized that neither the *Harris* nor the *Ylst* presumption could be employed under these circumstances. *Id.* The court further recognized that *Harris* and *Ylst* required it to determine whether the state court order was based on a procedural bar or on the merits -- "not an easy task." *Id.* The Ninth Circuit decided that "a California Supreme Court's denial of a habeas petition without comment or citation constitute[s] a decision on the merits of the federal claims, and thus such claims [will] be subject to review in federal habeas proceedings." *Id.* at 347-48 (quoting *Harris v. Superior Court*, 500 F.2d at 1228-29 (creating the same presumption to find claims exhausted)).

The first problem with the Ninth Circuit's reliance on the *Hunter* presumption in *Chavis* is that it answers the wrong question. In *Hunter* and *Harris v. Superior Court*, the Ninth Circuit had to decide whether the state courts' unexplained denials were decisions on the merits for the purpose of determining whether the claims were procedurally defaulted or exhausted. But the question that *Saffold* required the Ninth Circuit to decide in *Chavis* was *not* whether the California Supreme Court reached the merits of Chavis's 1997 habeas petition, and it had nothing to do with procedural default. The question was whether Chavis had unreasonably delayed in bringing his claims to the court three years after denial by the lower court. As this Court has explained, a conclusion that the state court reviewed or considered the merits of a prisoner's claims before denying relief does not resolve the question whether the petition was timely filed. *Saffold*, 536 U.S. at 225-26; *see also Pace*, 125 S. Ct. at 1812-14.

Furthermore, this Court's opinions in *Coleman* and *Ylst* make it clear that the Ninth Circuit did not undertake the appropriate analysis before creating a new conclusive presumption. In applying the *Hunter* presumption in this new context, the Ninth Circuit made no attempt to determine whether it would actually achieve the correct result in almost all cases. *See Coleman*, 501 U.S. at 737. Conclusive presumptions are "designed to avoid the costs of excessive inquiry" but only

"where a *per se* rule will achieve the correct result in almost all cases." *Id.* However, "the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Id.*

Here, the Ninth Circuit has made no effort to evaluate whether petitions for habeas corpus denied by California courts without comment or citation are timely under California law "most of the time." And as discussed in more detail in Part B(2), such an analysis would not support the Ninth Circuit's conclusion. Again, even if an unexplained order is presumed to be a decision on the merits, that does not answer the question whether the court addressed the merits because the petition was timely or because it excused an untimely filing or because it was simply easier to do so. Moreover, while the California Supreme Court frequently will at least indicate a procedural bar in its orders, *Robbins*, 959 P.2d at 340 n.34, the California Court of Appeal generally does not. *See* Part B(2)(c).

The Ninth Circuit seemed to adopt the rationale offered in *Hunter* for assuming that its conclusive presumption would be accurate most of the time. That is, because the Ninth Circuit first stated that an unexplained California Supreme Court order would be presumed a decision on the merits in *Harris v. Superior Court* in 1974, the California Supreme Court must be issuing its orders accordingly. *Hunter*, 982 F.2d at 348; *see* Pet. App. A at 9 ("When the California Supreme Court denies a habeas petition without comment or citation, we have long treated the denial as a decision on the merits."). But this turns the guiding principle of conclusive presumptions on its head. A presumption should reflect actual practice, not dictate it. Indeed, this Court has rejected this very argument that "a broadly applicable presumption is not counterfactual after it is announced." *Coleman*, 501 U.S. at 738. The Court explained:

> We can establish a *per se* rule that eases the burden of inquiry on the federal courts in those cases where there are few costs to doing so, but we have no power to tell state courts how they must write their opinions. We encourage state courts to express plainly, in every decision potentially subject to federal review, the grounds upon which their judgments rest, but we will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim--every state appeal, every denial of state collateral review--in order that federal courts might not be bothered with reviewing state law and the record in the case.

Id. at 739.

A state court will not necessarily respond to the announcement of a presumption, such as the one announced in *Chavis*, by issuing express findings in every case. *Id.* at 738. Many state courts are overburdened and have other concerns that compete with the "dignity interest in seeing that their state law decisions are not ignored by a federal habeas court." *Id.* at 738. State courts should not have to shoulder the burden of shielding their decisions from federal review; the federal courts should take on the burden of justifying interference. As this Court has said, "A broad presumption would also put too great a burden on the state courts. It remains the duty of the federal courts, whether this Court on direct review, or lower federal courts in habeas, to determine the scope of the relevant state court judgment." *Id.* at 739. Here, the Ninth Circuit has created a rule of convenience and shifted the burden to the state courts so that it "might not be bothered with reviewing state law and the record in the case," *id.*, to determine whether a state habeas petition was timely.

The broad and irrebuttable presumption employed by the Ninth Circuit in *Chavis* is all the more problematic because the danger in its use is not that the doctrine of comity will be offended, as in *Coleman*, *Ylst*, *Harris*, *Hunter*, and *Harris v. Superior Court*, but that the express purpose of a federal statute will be thwarted. As the Ninth Circuit noted in *Harris v. Superior Court*, "[T]he doctrine which requires the exhaustion

of state remedies before the federal court will entertain habeas corpus petitions is based on comity and is not a limitation on the power or jurisdiction of the federal courts." *Harris v. Superior Court*, 500 F.2d at 1126-27. By contrast, the AEDPA period of limitation is exactly that: a limitation on the power of the federal court to review state court judgments. *See Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003) ("In the interest of finality AEDPA constrains a federal court's power to disturb state-court convictions").

In short, the Ninth Circuit has ignored this Court's instructions in *Saffold* and, instead, instituted its own conclusive presumption, which again "threatens to undermine the statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims," *Saffold*, 536 U.S. at 226, and seriously undermines Congress's intent to "curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." *Williams*, 529 U.S. at 386 (opinion of Stevens, J.); *see also id.* at 404 (majority opinion).

D. The Ninth Circuit's Rule Would Have The Negative Effect Of Either Forcing California State Courts To Rule On The Timeliness Of All Habeas Petitions Or Undermining The AEDPA Limitations Period

If the Ninth Circuit's rule is allowed to stand, it will have one of two possible effects, both unacceptable.

As it stands now, under *Chavis*, every petition that is denied after the state court's preliminary assessment with an unexplained summary denial will be presumed timely. The California Supreme Court issued 1,223 unexplained denials out of 2,426 summary dispositions in 2004. (See Part B(2)(c) regarding Lexis search.) The California Court of Appeal decided 4,556 out of 4,761 criminal "original proceedings" without a written opinion in the fiscal year 2002-2003. 2004 Court Statistics Report, *supra*, at 35. And as discussed above

and as noted in the *Saffold* dissent, "the California courts routinely deny petitions filed after lengthy delays without making specific findings of undue delay." *Saffold*, 536 U.S. at 235 (Kennedy, J., dissenting).

Nevertheless, under *Chavis*, *all* of these thousands of California petitions must be considered timely by the federal district court and *all* will receive statutory tolling for the period preceding their filing, no matter how lengthy a period that might be and "even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts." *Saffold*, 536 U.S. at 226; *see, e.g.*, *Gaston v. Palmer*, 387 F.3d 1004, 1018 (9th Cir. 2004) (allowing tolling for gaps of 307 and 282 days because the California courts summarily denied Gaston's petitions without making findings of untimeliness or lack of diligence). This is manifestly contrary to Congress's intent in enacting AEDPA. The one-year limitation period is intended to "reduce the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan*, 533 U.S. at 179; *accord*, *Rhines*, 125 S. Ct. at 1534; *see* H.R. Rep. No. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944 (purpose of habeas corpus reform in AEDPA is "to curb the abuse of the statutory writ of habeas corpus"). The tolling provision exists primarily for the benefit of the state, in that it "promotes the exhaustion of state remedies," thereby allowing the state courts the first opportunity to resolve constitutional claims. It does this by preserving a state prisoner's ability to apply for federal habeas relief after exhaustion, incidentally benefitting the prisoner. *Duncan*, 533 U.S. at 179. But AEDPA requires the prisoner to make proper use of his or her state's established procedures for collateral review while exhausting his claims. 28 U.S.C. § 2244(d)(2); *O'Sullivan*, 526 U.S. at 844-45. The tolling provision does not exist to allow habeas petitioners -- and certainly not California petitioners in particular -- to escape the AEDPA period of limitation by the simple expedient of filing a delayed application in state court in

the hope that the state court may not explicitly reject it for untimeliness for the reasons that it is overburdened with thousands of similar filings and state law does not require such a finding.

And, of course, California's expressed interest in finality is frustrated as well under *Chavis*. The California Supreme Court has made it abundantly clear that it is important to the state that innocence or guilt be vindicated without delay; that vital evidence not be lost or become stale before a new trial; and that victims and/or their families be allowed to recover. *Sanders*, 981 P.2d at 1042; *Robbins*, 959 P.2d at 316; *Clark*, 855 P.2d at 746.

The argument no doubt will be made that California state courts can protect the state's interest in finality by explicitly ruling on the timeliness of each state habeas petition. And this is the other possible result of the *Chavis* holding. This Court, however, has cautioned against imposing this sort of burden on the state courts. *Coleman*, 501 U.S. at 739. The federal courts should not -- indeed, are without power to -- tell the state courts how to issue their decisions or opinions. *Id.* In particular, the federal courts may not impose such a burden just for the convenience of the federal courts. *Id.* In this situation, forcing the California courts to state in every habeas case whether the petition was timely would mean that the courts would have to fundamentally alter California's venerable state habeas corpus scheme or expend valuable resources or both. No longer could the state court expeditiously and summarily dispose of petitions that plainly do not make a prime facie case.

The state court could of course seek assistance in deciding timeliness by obtaining responses from the Attorney General, but the California Supreme Court already explained more than ten years ago that such a burden would be "intolerable," *Clark*, 855 P.2d at 762 n.36 -- and the flood of state habeas filings has not abated since then. The state courts could add numerous judges or staff members, but no one could seriously suggest that this is a viable plan. California could replace its state habeas

scheme with post-conviction rules or statutes that include a simple determinate time limit, as other states have done. But California's reasonableness standard is an "equitable concept [that] is designed to be flexible, and it allows California courts to correct miscarriages of justice, even those which happened long ago." *Saffold*, 536 U.S. at 235 (Kennedy, J., dissenting). California has every right to employ such a system.

On the other hand, not only is it compelled by AEDPA and *Saffold*, but it would be more practical and efficient to have the federal court decide, in those cases in which there is no explicit state court finding, whether a California petitioner's state habeas petitions were timely filed before granting statutory tolling for the intervals between filings. This inquiry would have to be undertaken in a far more limited group of cases. It will *potentially* have to be made in only the cases that reach federal court, and then only where the issue is presented, instead of in all cases in state court whether or not it is necessary to the state court disposition. Even in the smaller number of federal habeas cases, it will not have to be undertaken if the federal petition is filed within the one-year AEDPA period of limitation regardless of tolling. It will not have to be undertaken if the federal court can dismiss the petition on other grounds under Rule 4 of the Rules Governing Section 2254 Cases. In some cases, a clear ruling from the state superior court or other court will render the state petition not properly filed under *Pace*, and that will resolve the question of statutory tolling. Moreover, the federal court will be able to conserve judicial resources by identifying those cases that may be dismissed as time-barred by the AEDPA limitations period.

E. The Ninth Circuit's Rule Is Inconsistent With The Practice In All Other Circuits To Have Addressed The Issue

Other courts -- and some Ninth Circuit judges -- have understood how the AEDPA limitations period and tolling provision must work with state practice and procedure. Judge

Kleinfeld has written (in dissent):

> "Congress and the courts appropriately built slack into the process by providing a reasonable grace period for pending applications, not for open-ended and unjustified delay in pursuing claims and relief." [*Welch v. Carey*, 350 F.3d at 1083] . . . 307 and 282 days exceed a "reasonable grace period." Legal deadlines are usually on the order of 7, 10, 30, and 60 days.
>
> The point of the play in the joints allowed by *Saffold* and *Welch* [*v. Carey*] is to fold California's unusual procedure into something akin to an ordinary state appellate exhaustion process, with the exception, as the Court noted in *Saffold*, that instead of the usual fixed and rigid period for filing notice of appeal, California allows a reasonable time to take a claim "up the ladder" to the next higher court. Expanding this to a petitioner who goes down the ladder instead of up, and who waits the better part of a year between filings, makes a mockery of the statute of limitations that Congress has imposed.

Gaston, 387 F.3d at 1020 (Kleinfeld, J., dissenting).

In *Allen v. Mitchell*, 276 F.3d 183 (4th Cir. 2001), the Fourth Circuit confronted the same situation that the Ninth Circuit faced here. As in California, there is no "fixed appellate deadline under North Carolina law." *Id.* at 186. Under North Carolina law, a non-capital prisoner whose "motion for appropriate relief" has been denied by the superior court may seek review by filing a petition for certiorari in the North Carolina Court of Appeals, and such a petition "must be filed 'without unreasonable delay.' N.C.R.App. P. 21(e)." *Id.* As in this case, the North Carolina Court of Appeals rejected Allen's petition through a summary order, without making any finding of untimeliness. *Id.* Unlike the Ninth Circuit, however, the Fourth Circuit did not interpret the state court order as

conclusively establishing that the state petition was timely and did not shift the burden to the state courts to make an express finding of timeliness in every case.

The *Allen* court recognized that, although Allen's petition had not been dismissed as untimely by the state court, it did not follow that there was no "unreasonable delay" under the North Carolina statute. *Allen*, 276 F.3d at 186-87. This is because "the court of appeals may simply have opted to 'excuse[] the untimeliness as a matter of state law and rule[] on the merits.'" *Id.* at 187 (quoting *Fernandez v. Sternes*, 227 F.3d 977, 981 (7th Cir. 2000)). Consequently, the *Allen* court remanded the case for further proceedings to determine whether Allen's certiorari petition was timely under the state's "without unreasonable delay" standard that required a determination of whether or not the petition would be subject to dismissal under the equitable doctrine of laches. *Id.* at 187.

In *Fernandez*, 227 F.3d at 981, the Seventh Circuit severely criticized the Ninth Circuit's tolling rule as originally set forth in *Saffold v. Newland*, 224 F.3d 1087 (9th Cir. 2000) [hereinafter *Saffold I*], *amended*, 250 F.3d 1262, *vacated by Saffold*, 536 U.S. at 227, stating that it preferred "reality" over the Ninth Circuit's "make-believe approach, under which petitions were *continuously* pending whenever a state court allows an untimely filing." The Seventh Circuit explained that:

> It is sensible to say that a petition continues to be "pending" during the period between one court's decision and a timely request for further review by a higher court (provided that such a request is filed); it is not sensible to say that the petition continues to be "pending" after the time for further review has expired without action to continue the litigation. That a request may be resuscitated does not mean that it was "pending" in the interim.

Fernandez, 227 F.3d at 980.

The *Fernandez* court's critique of the Ninth Circuit's

original tolling rule is equally applicable to the conclusive presumption of timeliness established in the instant case, which simply resurrects the approach taken in *Saffold I.* The Ninth Circuit's continued practice of granting tolling under 28 U.S.C. § 2244(d)(2) for delays of many months or years "as long as the state court denied the belated request on the merits" continues to be, in the words of the Seventh Circuit, an "implausible understanding of § 2244(d)(2)" that will "sap the federal statute of limitations of much of its effect." *Fernandez*, 227 F.3d at 980.

Decisions from the Fifth, Tenth, and Eleventh Circuits show that *Allen* and *Fernandez* represent the majority view. *See Moore v. Crosby*, 321 F.3d 1377, 1381 (11th Cir. 2003) (holding "that the petitioner's belated appeal motion was not pending during the limitations period" because such an application "does not relate back so as to toll idle periods"); *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001) (holding that "[a] state court's subsequent decision to allow review may toll the time relating directly to the application, but it does not change the fact that the application was not pending prior to the application. Thus, after the appeal period has lapsed, an application ceases to be pending but a subsequently properly filed application entitles the petitioner to additional tolling beginning at the time of the 'proper' filing"); *Gibson v. Klinger*, 232 F.3d 799, 804 (10th Cir. 2000) (holding that a "state court's grant of leave to appeal out of time cannot erase the time period during which nothing was pending before a state court").[9]

Just as prisoners who fail to timely file their applications for state collateral review in states with precise time limits will

9. The Fourth, Fifth, and Tenth Circuits would, however, allow statutory tolling for the period in which the prisoner could have filed a timely request for review by a higher state court. *Allen*, 276 F.3d at 187; *Melancon*, 259 F.3d at 406-07; *Gibson*, 232 F.3d at 803. The Warden agrees with the Seventh Circuit that a petition, application, or request that is not actually filed cannot be considered pending during the period provided for doing so. *Gutierrez v. Schomig*, 233 F.3d 490, 492 (7th Cir. 2000).

fail to qualify for tolling during the period of delay even though their state courts choose to decide their claims on the merits or not to make a finding of untimeliness, prisoners in California who fail to timely file their state petitions by engaging in substantial delay under California law should not qualify for tolling under *Saffold* even though the state court may have addressed their claims on the merits and even though the state court did not make an explicit finding of untimeliness.

F. Federal Courts Must Therefore Determine For Themselves Whether A Summarily-Denied California Habeas Petition Was Timely Filed, Where That Is Necessary To Resolving The Timeliness Of A Federal Habeas Petition

In light of the purpose of the AEDPA limitations period and tolling provision, this Court's decision in *Saffold*, and state practice, the Ninth Circuit was wrong to institute a conclusive presumption that all applications for state habeas relief are timely filed if the California appellate court issues an unexplained summary denial. In those cases that present the question whether a California prisoner unreasonably delayed between state court filings so that he is not entitled to statutory tolling, the federal court will be quite capable of making the determination. The issue will be raised by the State Attorney General on behalf of the respondent warden. The Attorney General always considers whether a federal petition is subject to dismissal based on the AEDPA period of limitation or other reasons, and files motions in appropriate cases. The Attorney General can thereby direct the court's attention to the relevant dates and documents, and make an argument based on California's timeliness standards for the court's consideration.

To meet the California requirement of timeliness "the habeas corpus petition must be filed within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *Harris*, 855 P.2d at 398 n.7.

California's Judicial Council form petition implements California's requirement that the petitioner establish timeliness, and California law provides considerable guidance in applying its flexible standard. Moreover, standards such as reasonableness and due diligence are quite common in the law and courts are regularly called upon to apply such terms.

Indeed, these terms appear in the federal habeas statutes. For federal prisoners, the AEDPA period of limitation may start running on "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of *due diligence*." 28 U.S.C. § 2255, ¶ 4 (emphasis added). There is a similar provision for state prisoners: the AEDPA period of limitation may start running on "the date on which the factual predicate of the claim or claims presented could have been discovered though the exercise of *due diligence*." 28 U.S.C. § 2244(d)(1)((D) (emphasis added). This is remarkably similar to the California standard. And as this Court recently noted in applying the due diligence requirement of section 2255, "[c]ertainly . . . 'due diligence' is an inexact measure of how much delay is too much. But the imprecision here is no greater than elsewhere in the law when diligence must be shown. . . ." *Johnson v. United States*, 125 S. Ct. 1571, 1581 n.7 (2005). And, in fact, this Court had no difficulty in applying the concept to the facts in the case before it. *See id.* at 1582. Similarly, the term "unreasonable . . . is a common term in the legal world and, accordingly, federal judges are familiar with its meaning." *Williams*, 529 U.S. at 410 (discussing 28 U.S.C. § 2254(d)).

In practice, California's timeliness standards require a prisoner to present his habeas claims quickly. The California Supreme Court has explained that a petition for writ of habeas corpus "should be filed as promptly as the circumstances of the case allow." *In re Stankewitz*, 708 P.2d 1260, 1262 n.1 (Cal. 1985); *accord*, *Clark*, 855 P.2d at 738 n.5. "Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information

offered in support of the claim and the legal basis for the claim." *Robbins*, 959 P.2d at 317, 322; *accord*, *Sanders*, 981 P.2d at 1042-43. For most claims arising out of a trial, "[t]hat time may be as early as the date of conviction." *Clark*, 855 P.2d at 738 n.5.

Generally, habeas claims involving matters outside the record, such as ineffective assistance of counsel, should be presented in conjunction with the direct appeal. *Harris*, 855 P.2d at 398 n.7. Claims that are based solely on facts in the appellate record must be raised on direct appeal first, then may be renewed in a timely fashion on habeas corpus *if* they come within an exception to the rule that claims raised and decided on appeal cannot be presented on habeas corpus. *Id.*; *see In re Waltreus*, 397 P.2d 1001, 1005 (Cal. 1965). If a petitioner presents claims based on facts discovered after conviction, the petitioner must establish, with specificity, due diligence in investigating both the facts and the legal bases for relief. *Clark*, 855 P.2d at 745, 748; *Stankewitz*, 708 P.2d at 1262 n.1.

Of course, these guidelines focus on the filing of an initial petition in superior court, the timeliness of which is generally irrelevant in considering whether a petitioner is entitled to tolling for the interval after denial by a lower court and before filing at the next level. But it can be inferred from the guidelines provided by the California Supreme Court that California law contemplates that a prisoner will seek state habeas relief at least as expeditiously as he would pursue his appeals.[10/] In California, defendants must file notice of their direct appeal sixty days after mailing or service of the notice of entry of the judgment against them. Cal. Rules of Court, rule 2. It is certainly "reasonable" to expect that petitioners file their state habeas petitions in the Court of Appeal within a similar

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10. Indeed, the very purpose of vesting original habeas corpus jurisdiction in the different levels of state court is to avoid the delays inherent in the appellate process and to thereby expedite the process. *Mazoros*, 142 Cal. Rptr. at 612.

time frame, particularly when it is a matter of re-filing an already composed petition in a higher court.

Defendants who seek review of a California Court of Appeal decision must file a petition for review in the California Supreme Court within ten days after the Court of Appeal's decision is final.[11/] Cal. Rules of Court, rule 28(e). Indeed, this is the preferred alternative for a habeas petitioner whose petition has been denied by the Court of Appeal. *Saffold*, 536 U.S. at 224-25 (citing *Reed*, 663 P.2d at 217 n.2); *see* Cal. Penal Code § 1506; Cal. Rules of Court, rule 28(e)(1). Surely, then, it is not permissible for a state habeas petitioner to extend this time indefinitely by choosing the alternative of filing an original petition in the California Supreme Court. It is reasonable to expect a habeas petitioner to file a petition in the California Supreme Court within a similar time frame.

These are reasonable expectations in practice. Recently, this Court considered "reasonable time limits" for a petitioner to return to state court to exhaust claims while his mixed federal petition is held in abeyance. *Rhines*, 125 S. Ct. at 1535. The Court instructed that the district court should usually condition the stay on the petitioner applying to the state court within thirty days of the stay order, and returning to federal court within thirty days of the state court order. *Id.*

And as this Court observed in *Saffold*, other states specify limits "such as 30 or 45 days" for appealing the denial of habeas relief to the next tier of reviewing court. *Saffold*, 536 U.S. at 222. California's habeas scheme functions in practice very much like a collateral review scheme that provides for appellate review. *Id.* at 221-23. That is, the California scheme leads the state prisoner to present his claims first to the trial court and then proceed to a higher court so that "a prisoner who files [the] same petition in a higher, reviewing court will find that he can obtain the basic appellate review that he seeks, even though it

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11. The Court of Appeal's summary denial of a petition for writ of habeas corpus is final upon filing. Cal. Rules of Court, rule 24(b)(2)(A).

is dubbed an 'original' petition." *Id.* at 222. A California prisoner should therefore be filing essentially the same claims in the appellate courts that he filed in the trial court. *See id.* at 221-22.

In California, a petition for writ of habeas corpus is not a complex document. The prisoner is required only to state a prima facie case for relief. *Romero*, 883 P.2d at 393, 395. California law contemplates that the claims will be fully argued in the return and traverse, which become the principal pleadings.

In short, a petition for writ of habeas corpus should be filed in a California appellate court within sixty days after denial by a lower court. If not, the federal court should examine the petitioner's response to question 15 of the California Judicial Council form petition and any attached exhibits for the petitioner's explanation. In most cases it will not be difficult to determine whether the delay was unreasonable.

G. The Ninth Circuit Should Have Reviewed The Habeas Petition Chavis Filed With The California Supreme Court After A Three-Year Delay And Concluded It Was Untimely

"It remains to ask whether [Chavis] delayed 'unreasonably' in seeking California Supreme Court review. If so, his application would no longer have been 'pending' during this period." *Saffold*, 536 U.S. at 225.

On the record before the district court, it is not difficult to see that this three-year period constituted unreasonable delay. The California Court of Appeal denied Chavis's petition for writ of habeas corpus on September 29, 1994. J.A. 18. Chavis filed a petition for writ of habeas corpus presenting essentially the same claims plus one new subclaim, *see* footnote 3, in the California Supreme Court on November 10, 1997, more than three years later. Pet. App. F at 1. Of course, delayed presentation alone does not bar consideration of the merits of a habeas corpus petition. The court will consider the reasons

proffered for the delay. But it was therefore incumbent upon Chavis to "allege with specificity when he became aware of the factual and legal bases for the claims" and to point to particular circumstances sufficient to justify substantial delay in response to question 15 on the form petition. *Clark*, 855 P.2d at 753.

The explanation that Chavis offered to the California Supreme Court was as follows: "Your petitioner is a layman of law and was illegally and actively being denied access to the court by the prison petitioner is confined. Your petitioner was granted an intrainstitutional appeal to attain access to the court. (See Exhibit 1)." J.A. 20.

Chavis attached several documents from the prison relating to his access to the law library as Exhibit 1. *See* J.A. 22-31. A memorandum from a prison official reflects that on December 14, 1995, Chavis requested excused time off (ETO) to go to the law library. J.A. 31. The official's response was simply "I cannot grant ETO for you to go to the law library." J.A. 31. On December 19, 1995, Chavis submitted an inmate/parolee appeal form explaining that his work assignment required him to be at work at all times that the prison law library was open. J.A. 25-28. Chavis also explained that he had requested ETO from his job assignment, and that request had been rejected. J.A. 26, 28. Finally, Chavis explained that he had requested a change in his job assignment, which had been approved but never occurred. J.A. 28. Chavis requested that higher authority grant him ETO or that he receive a different job assignment. J.A. 26.

An "Appeal Log" for a "first level response," created by a prison Program Sergeant and dated January 12, 1996, denied ETO, but advised Chavis that he could still request a change in his work assignment. J.A. 29. In his "second-level" appeal, the Warden ordered on February 8, 1996, that Chavis would receive a hearing before the Unit Classification Committee to determine whether he could be assigned to a work position that would accommodate his need to use the law library. J.A. 23-24.

This is, on its face, an insufficient explanation for the three-year delay in filing a petition in the California Supreme

Court. Based on his own exhibits, Chavis's efforts to obtain access to the law library began on December 14, 1995, more than one year after the California Court of Appeal denied his petition on September 29, 1994.

Moreover, in Respondent's Reply to Petitioner's Opposition to Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus, the Warden provided the federal district court with an additional document. Chavis did in fact receive a different job assignment at his request on March 5, 1996. J.A. 73-74. He nevertheless delayed another eighteen months before filing his petition in the California Supreme Court in November 1997.

Chavis did not "allege with specificity when he became aware of the factual and legal bases for the claims." *Clark*, 855 P.2d at 753. There is therefore no basis from which it can be found that any of the supporting facts were only recently discovered. In any event, perusal of the claims in the November 1997 petition reveals that all of the claims of ineffective assistance of trial counsel in ground one were known to Chavis, or should have been known to him, at the time of his conviction in 1991. *See* Exh. F to Federal Petition. The claim of ineffective assistance of appellate counsel raised as ground two was, by Chavis's own account, known to him at the time of his direct appeal in 1992. *See id.*

In this case, then, it is a simple matter to apply California's reasonableness standard and conclude that Chavis's November 1997 state petition for writ of habeas corpus was untimely. And *Saffold* requires that Chavis not receive the benefit of statutory tolling under AEDPA for the interval of more than three years in which Chavis had no petition pending.

Under AEDPA, the one-year period of limitation commenced for Chavis on April 24, 1996. *Saffold*, 536 U.S. at 217. In the absence of tolling for the three-year period of delay, it expired at the end of the grace period, on April 24, 1997. *See Pace*, 125 S. Ct. at 1817. Chavis's August 2000 federal petition for writ of habeas corpus is time-barred, the district court was

correct to dismiss it, and the Ninth Circuit was wrong to reverse the district court.

CONCLUSION

For the above reasons, the Warden respectfully requests that this Court reverse the Ninth Circuit's decision in *Chavis* and reinstate the district court's dismissal of Chavis's application for writ of habeas corpus.

Dated: July 15, 2005 Respectfully submitted,

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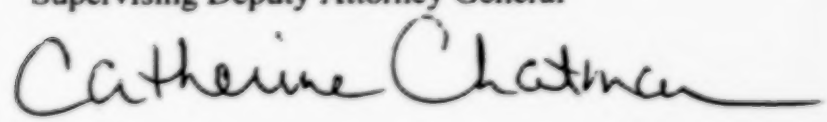

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MIKE EVANS, Warden,

Petitioner,

v.

REGINALD CHAVIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Section 2244(d)(2) of Title 28, United State Code, provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

In interpreting the statute, this Court previously held in *Carey v. Saffold*, 536 U.S. 214 (2002), that an application is "pending" between two levels of California state court review as long as the prisoner's latter filing was timely under California state law. The Question Presented by this case—which was neither decided nor even addressed in *Carey v. Saffold*—is:

When a warden argues that interval tolling pursuant to 28 U.S.C. § 2244(d)(2) is not available because a prisoner's filing was untimely (according to the warden) under California state law *but* the California state court has given no indication that the filing was untimely, should the federal court presume that the prisoner's application was "pending" (as the Ninth Circuit did and the Respondent urges) or should the federal court engage in an independent determination of whether the filing was timely under California state law (as Petitioner urges)?

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BRIEF FOR THE RESPONDENT

Respondent Reginald Chavis respectfully requests that the judgment of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") be affirmed.

RELEVANT STATUTORY PROVISION

Section 2244(d) of Title 28, United States Code, provides as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.
>
> * * *
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

This brief first outlines the relevant procedural rules for filing a petition for writ of habeas corpus in California federal court after the passage of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 ("AEDPA"). It then recounts the relevant procedural history of this case.

I. Federal Habeas Corpus Rules in California.

A. AEDPA Limitations and Tolling Provisions.

On April 24, 1996, AEDPA became effective. The statute imposed a new one-year limitations period on all petitions for writ of habeas corpus filed under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2244(d)(1). Where a prisoner's conviction became final prior to the effective date of AEDPA, however, "the federal limitations period [begins] running on AEDPA's effective date . . . giving [the prisoner] one year from that date . . . to file a federal habeas petition." *Carey v. Saffold*, 536 U.S. 214, 216-17 (2002).

AEDPA also provides for tolling of the limitations period for "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2). The tolling permitted by § 2244(d)(2) was included in AEDPA to "promote[] the exhaustion of state remedies" as required by 28 U.S.C. § 2254(c). *Duncan v. Walker*, 533 U.S. 167, 178 (2001).

B. California's Unique Collateral Review System.

Although § 2244(d)(2) of AEDPA clearly contemplates the tolling of certain periods of state collateral review, the federal courts have struggled to determine precisely which periods of time are properly tolled under the statute. This difficulty has been particularly acute in California due to the unique nature of the state's collateral review system. California's collateral review system is different from almost every other state in two respects.

First (and unlike every other state), California does not utilize a standard "up the ladder" appellate procedure in petitions for habeas relief. In California, the superior courts, the Courts

of Appeal, and the California Supreme Court all have original jurisdiction to hear petitions for habeas relief, *see* Cal. Const. Art. VI § 10, and the preferred—*but not required*—procedure is for prisoners to first file in superior court, then in the Court of Appeal, and then in the Supreme Court. *See In re Ramirez*, 108 Cal. Rptr. 2d 229, 232 (Cal. Ct. App. 2001). If a superior court denies the petition, the prisoner's only recourse is to file a new original petition in a higher state court—preferably the Court of Appeal. *See In re Clark*, 855 P.2d 729, 740 n.7 (Cal. 1993). If the Court of Appeal denies the petition, the prisoner may file a new original petition in the California Supreme Court.[1] *See In re Reed*, 663 P.2d 216, 217 n.2 (Cal. 2004), *overruled on other grounds by In re Alva*, 92 P.3d 311 (Cal. 2004).

Second (and unlike 48 of the 49 other states), there is no fixed deadline in California to file a petition for writ of habeas corpus before a state appellate court. Instead, "a petitioner seeking relief on habeas corpus need only file a petition without substantial delay, or if delayed, adequately explain the delay." *In re Harris*, 855 P.2d 391, 397 (Cal. 1993).

C. *Carey v. Saffold* and "Interval Tolling".

In 2002, this Court granted certiorari in *Carey v. Saffold*, a case that involved the application of AEDPA's tolling provision to California's unique system of collateral review. In deciding the case, the Court first addressed a question that applies to every state: "Does the word ['pending' in § 2244(d)(2)] cover

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1. Both the prisoner and the State have the right to seek review of the decision of the Court of Appeal in the California Supreme Court. *See* Cal. Penal Code § 1506. The deadline to file a petition for review is within ten days of the date on which the order issued by the Court of Appeal became final. *See* Cal. R. Ct. 28(e).

the time between a lower state court's decision and the filing of a notice of appeal to a higher state court?" *Saffold*, 536 U.S. at 217. This is often referred to as "interval tolling." Agreeing with every Court of Appeals that had addressed the issue, the Court interpreted the word "pending" in § 2244(d)(2) to authorize interval tolling. *Id.* at 220 – 221.[2]

Second, the Court addressed whether the word "pending" applied "similarly to California's unique state collateral review system—a system that does not involve a notice of appeal, but rather the filing (within a reasonable time) of a further original state habeas petition in a higher court". *Id.* at 217. Ultimately, the Court decided that "California's system functions in ways sufficiently like other state systems of collateral review to bring intervals between a lower court decision and a filing of a new petition in a higher court within the scope of the statutory word 'pending.'" *Id.* at 223. As a result, the *Saffold* Court held that § 2244(d)(2) authorized interval tolling even in California. *See id.* at 217, 221 – 225.

The *Saffold* Court finally addressed a considerably more narrow (and particularized) question: "was the petition at issue . . . (filed in the California Supreme Court 4½ months after the lower state court reached its decision) pending during that period, or was it no longer pending because it failed to comply with state timeliness rules?" *Id.* at 217. In answering this question, the Court implicitly held that tolling was not available

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2. In reaching this conclusion, the Court stated that, "an application is pending as long as the ordinary state collateral review process is 'in continuance'—*i.e.*, 'until the completion of' that process. In other words, until the application has achieved final resolution through the State's post-conviction procedures, by definition, it remains 'pending.'" *Saffold*, 536 U.S. at 219 – 220.

under § 2244(d)(2) between two levels of California state court review if a prisoner's filing with the higher court was untimely, stating:

> It remains to ask whether Saffold delayed "unreasonably" in seeking California Supreme Court review. *If so, his application would no longer have been "pending" during this period.*

Id. at 225 (emphasis added).

In light of the Court's premise that statutory tolling was not available between two levels of California state court review if a prisoner's filing with the higher state court was untimely, the Court was forced to address whether Mr. Saffold had "delayed 'unreasonably' in seeking California Supreme Court review." *Id.* at 225. The California Supreme Court had given some indication—albeit an ambiguous one—that it believed that Mr. Saffold had, in fact, delayed unreasonably. "The California Supreme Court denied the petition 'on the merits and for lack of diligence,' *which raised the question whether that court had dismissed for lack of merit, for untimeliness, or for both.*" *Pace v. DiGuglielmo*, 125 S. Ct. 1807, 1812 (2005).

Because of this ambiguity in the state court's ruling,[3] the Court criticized the Ninth Circuit for assuming that the California Supreme Court's decision to use the words "on the merits" necessarily meant that the California Supreme Court could not have found Mr. Saffold's petition to be untimely. This Court explained, "[g]iven the variety of reasons why the

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3. The California Supreme Court's denial was ambiguous because the phrase "lack of diligence" in its order could have referred to Mr. Saffold's delay during two different time periods, only one of which was relevant for purposes of AEDPA. *See Saffold*, 536 U.S. at 226.

California Supreme Court may have included the words, 'on the merits,' those words cannot by themselves indicate that the petition was timely." *Saffold*, 536 U.S. at 226. As such, this Court remanded the case to the Ninth Circuit to evaluate what the California Supreme Court meant by the phrase "lack of diligence." *Id.* at 226.

This Court gave no specific instruction to the Court of Appeals regarding what to do if it could not determine what the California Supreme Court meant by "lack of diligence." Instead, the Court merely stated:

> We leave it to the Court of Appeals to evaluate these and any other relevant considerations in the first instance. We also leave to the Court of Appeals the decision whether it would be appropriate to certify a question to the California Supreme Court for the purposes of seeking clarification in this area of state law.

Id. at 226 – 27.

In so doing, *Saffold* necessarily left open the very question presented by this case: What is a federal court to do when a warden argues that interval tolling pursuant to 28 U.S.C. § 2244(d)(2) is not available because a prisoner's filing was untimely (according to the warden) under California state law *but* the California state court—unlike in *Saffold*—has given *no indication* that the prisoner's filing was untimely? May the federal court presume that the application was "pending," or must it instead engage in an independent determination of whether the filing was timely under California state law? This is the dispositive question squarely presented by this case.

II. The Procedural History of This Case.

A. Conviction and Direct Appeals.

Following a jury trial in Sacramento County, California, Respondent Reginald Chavis was convicted of attempted murder and mayhem on July 29, 1991. J.A 2. On July 30, 1992, the California Court of Appeal affirmed his conviction. J.A. 2. On September 4, 1992, Mr. Chavis filed a petition for review with the California Supreme Court. J.A. 2. On October 28, 1992, the California Supreme Court denied Mr. Chavis' petition for review. J.A. 2.

B. Lower State Court Collateral Review.

Mr. Chavis, acting *pro se*, began to exhaust his state remedies on May 14, 1993 when he filed a petition for writ of habeas corpus in the Sacramento County Superior Court. J.A. 2. On July 30, 1993, the Superior Court denied this petition. J.A. 7-17. Following the accepted procedure in California, Mr. Chavis—again acting *pro se*—next filed a further original petition for a writ of habeas corpus in the California Court of Appeal on August 22, 1994. J.A. 3. On September 29, 1994, the Court of Appeal denied this petition. J.A. 3.

C. California Supreme Court Collateral Review.

1. Delayed filing.

As Mr. Chavis explained in his *pro se* papers before the district court in this case:

> Some time after the denial of [the May 14, 1993 California Superior Court] petition, petitioner was assigned prison duties. Petitioner was required to

> perform these duties 5 days weekly, on 7 and a half hour shifts per day – on the exact days and [times when] the law library . . . was available to inmates. Petitioner was unable to have access to necessary materials and information needed, as custody refused to allow petitioner access to the law library. However, petitioner made efforts continually, to go forward with his collateral efforts without the access. Remaining confused and unable to understand the many technical matters confronting him, petitioner [filed his habeas petition with the California Court of Appeal] on August 22, 1994 [which] was denied on September 29, 1994. Being aware that he had been insufficiently and inadequately prepared [in his filing with the California Court of Appeal] . . . petitioner decided against . . . again attempting to go forward with filing another application with "guess work." Petitioner would try to persuade custody to allow him the access that he needed, first.

J.A. 37-38.

For some time, Mr. Chavis attempted informally and unsuccessfully to convince the prison authorities to permit him access to the library. J.A. 28, 38. Mr. Chavis:

- asked his supervisor to be granted time off in accord with the relevant statute in order to use the library; J.A. 28;

- wrote to "the law librarian and ask[ed] for PLU [privileged library use] status as a result of [his] situation, to which [he] never received a response"; J.A. 28, and

- "submitted a Job Change application which was approved . . . but never occurred. . . ." J.A. 28.

Eventually, Mr. Chavis was told by another inmate that the prison's refusal to permit him access to the library was an illegal deprivation of his access to the courts and that he could file a formal grievance.[4] J.A. 38. Mr. Chavis filed such a grievance on December 12, 2005. J.A. 26. In this grievance, Mr. Chavis clearly stated the problem:

> This inmate is assigned to the above stated position . . . with stipulated RDO's [regular days off] being Sun/Mon. I am currently without a hired attorney but, I work pro-per on my criminal case and I am in the process of attempting to pursue a filing of a habeas corpus petition on my criminal conviction. In order to complete my petition it is necessary for me to get into C-facility's law library to research and obtain the required law, points and authorities to validate my filing. My problem is that the law library is closed on Sun/Mon, which, incidently [*sic*] are also my assigned RDO's. The library closes at about 1:45 p.m. during it's [*sic*] open days of the week, and this inmate is not permitted to be relieved from duty until 1:30 p.m. I have no reasonable access to the law library. I have discussed this problem with c/o [correctional officer] Fender who supervises me, and he advises me that he can not relieve me from

4. *See, e.g., Lewis v. Casey*, 518 U.S. 343, 346 (1996) ("'[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.'") (quoting *Bounds v. Smith*, 430 U.S. 817, 828 (1977)).

> duty to go to the library regardless of the circumstances.

J.A. 25, 28. This grievance was summarily denied the very day after it was filed. J.A. 31.

Mr. Chavis immediately filed a formal appeal of the denial of this grievance. J.A. 25-28. In this appeal, Mr. Chavis stated:

> My superior says that he can't grant me ETO [excused time off]. However, in accord to [*sic*] 3045.2 (2)(G)(5) the lieutenant or high authority can do so. Please . . . unassign me or change me to a PM assignment A.S.A.P. Thank-you.

J.A. 26.

About one month later, Mr. Chavis received a "first-level" response to his appeal. J.A. 29-30. This response stated:

> You are requesting use of ETO [excused time off] time [] to go to the library. . . . On January 12, 1996, you were interviewed and an investigation was conducted by this writer regarding the above-noted appeal. During my investigation I found that use of ETO time is not an option for you in this circumstance. California Code of Regulations, title 15, Section #3045.2 specifies authorized use of ETO time. Access to the Legal Library is not listed, nor is it considered a "non-routine recreation and entertainment" activity, as you suggest. You [*sic*] best option at this point is to request a work assignment change that would allow access to the Legal Library as a GLU [general library use]. . . . For the reasons cited above your appeal is DENIED.

J.A. 29-30. Mr. Chavis immediately filed a formal appeal of this denial *again* requesting either excused time off or a job reassignment. J.A. 28.

Another month later, Mr. Chavis received a "second-level" written response to his appeal. J.A. 23-24. In this response, Mr. Chavis' request for excused time off to go to the law library was again denied. J.A. 24. Mr. Chavis' request to have his job changed to one that would permit him some access to the law library was referred to the prison's Unit Classification Committee. J.A. 24. The next month, the Unit Classification Committee recommended Mr. Chavis for an evening position, J.A. 73-74, and at some point thereafter he received a new job.

Mr. Chavis' reassignment was essentially meaningless, however, because there were a series of lockdowns at his prison and he was not permitted to use the law library as a result. Although Mr. Chavis does not have access to the records of his former prison, he recalls that his area was locked down continuously for five months in 1996 and regularly throughout 1997. J.A. 39.

2. "Postcard" denial.

As a result of the grievance process and lockdowns described above, Mr. Chavis was unable to file a habeas petition with the California Supreme Court until November 10, 1997. J.A. 3. In this November 10, 1997 filing, Mr. Chavis answered Question 15 of the Judicial Council Form required by the State of California as follows:

> [Question:] Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. [Answer:] Your petitioner is

> a layman of law and was illegally and actively being denied access to the court by the prison [where] petitioner is confined. Your petitioner was granted an intrainstitutional appeal to attain access to the court. (See Exhibit 1).

J.A. 19-21. Mr. Chavis attached several pages of evidentiary support as Exhibit 1 to his habeas filing in support of his answer to Question 15. J.A. 22-31.

On April 29, 1998, the California Supreme Court denied Mr. Chavis' petition. The order denying the petition read in its entirety: "The petition for writ of habeas corpus is DENIED." J.A. 32. A denial without any comment or case citation such as this is commonly referred to as a "postcard" denial.

D. Federal Court.[5]

On August 30, 2000, Mr. Chavis filed a petition for writ of habeas corpus in federal district court. J.A. 5. On February 13, 2001, the warden filed a motion to dismiss Mr. Chavis' petition on the ground that it was time-barred under the one-year statute of limitations in § 2244(d)(1) of AEDPA. J.A. 5. On September 20, 2001, the district court granted the motion and dismissed the case. J.A. 5. On October 1, 2001, Mr. Chavis filed a notice of appeal. J.A. 5. On August 27, 2004, the Ninth Circuit filed

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5. After he became aware of new facts and law (and prior to filing in federal court), Mr. Chavis filed a second round of state habeas petitions. J.A. 3-4, 40-41. This second round of state habeas filings is not relevant to the issue currently before this Court, as Petitioner's arguments (and the grant of certiorari) relate exclusively to the three-year delay between the denial of the habeas petition by the California Court of Appeal in September 1994 and the November 1997 filing of the habeas petition in the California Supreme Court.

an opinion and entry of judgment that reversed the district court and remanded the case for further proceedings. J.A. 6.

On November 22, 2004, the warden filed a petition for writ of certiorari with this Court. In this petition, the warden asked this Court to grant certiorari on the following question:

> Did the Ninth Circuit contravene this Court's decision in *Carey v. Saffold* when it held that a prisoner who delayed more than three years before filing a habeas petition with the California Supreme Court did not "unreasonably" delay in filing the petition – and therefore was entitled to tolling during that entire period – because the California Supreme Court summarily denied the petition without comment or citation, which the Ninth Circuit construes as a denial "on the merits"?

SUMMARY OF ARGUMENT

This case presents an important question that has never been resolved by this Court:

> What is a federal court to do when a warden argues that interval tolling pursuant to 28 U.S.C. § 2244(d)(2) is not available because a prisoner's filing was untimely (according to the warden) under California state law *but* the California state court has given no indication that the prisoner's filing was, in fact, untimely?

Petitioner's position is that, under such circumstances, a federal court must conduct its own independent analysis of state law in order to determine whether or not the prisoner's prior state filing was timely. Respondent's position—which was adopted by the

Ninth Circuit—is that the federal court should presume that a prior state filing was "pending" under § 2244(d)(2) unless the state court gives *some indication* that the prior state petition was not timely filed under state law.

The primary argument advanced by Petitioner in support of his position is the assertion that Respondent's presumption was already rejected by this Court in *Carey v. Saffold*. Petitioner is mistaken. Unlike this case, *Saffold* did not involve a California state court order that was silent on the issue of whether the prisoner's filing was untimely. To the contrary, this Court's decision in *Saffold* was predicated on the very notion that an ambiguous phrase in the California Supreme Court's order *could have indicated* that the state court found the prisoner's filing to be untimely under state law. In *Saffold*, this Court remanded the case because the Court of Appeals had failed to consider whether or not the California Supreme Court had, in fact, ruled that the relevant prior state petition was untimely filed. *Saffold* gave no instruction to the Court of Appeals regarding what to do if it could not determine what the California Supreme Court meant by its ambiguous language. In so doing, this Court necessarily left open the very question presented by this case.

As Petitioner concedes, the text of § 2244(d)(2) does not indicate whether Respondent's presumption—or the independent determination rule urged by Petitioner—is the approach intended by Congress. For this reason, this Court must select the rule that is more consistent with the purpose of AEDPA as well as the purpose of the Great Writ. The presumption urged by Respondent is more consistent with both.

Congress enacted AEDPA to further the principles of federalism, comity, and finality. AEDPA's statute of limitations

serves the states' interest in finality. AEDPA's exhaustion requirement serves to promote comity. Section 2244(d)(2)—AEDPA's tolling provision—balances the interests served by the exhaustion requirement and the limitation period. It promotes exhaustion by protecting a prisoner's ability to pursue state remedies without losing the opportunity to later file in federal court. At the same time, it serves the states' interest in finality by only tolling the federal limitations period for a prisoner's proper use of state collateral procedures. Respondent's presumption is far more faithful than Petitioner's rule to the careful balance struck by Congress in § 2244(d)(2).

Respondent's presumption promotes federalism by preventing federal courts from "second-guessing" state courts' determinations of state law. Under Petitioner's rule, federal courts will announce—and necessarily affect—California law regarding timeliness where the state courts, for a number of good reasons (all acknowledged as valid by Petitioner), felt it inappropriate to do so. Petitioner claims that Respondent's presumption will compromise federalism by "forcing" state courts to note in every habeas case whether a prisoner's state petition was timely. This contention, however, has already been properly rejected by this Court in the procedural bar context. Put simply, it is far less intrusive to require state courts to give some indication that a state petition is untimely than it is for federal courts to conduct an independent determination of state law.

Respondent's presumption promotes comity by encouraging prisoners to exhaust state remedies in the manner provided by the state. In contrast, Petitioner's rule will encourage *both* protective federal filings *and* premature state filings. And, in light of this Court's recent decision in *Pace*, Petitioner's rule will have such an effect not only in California, but in each of the fifty states.

Respondent's presumption does not compromise finality, certainly not to the extent suggested by Petitioner. Notably, Respondent's presumption and Petitioner's independent determination rule achieve identical results in cases where a prisoner's petition fails to state a prima facie case for relief. And in cases where a potential constitutional violation has been alleged, it is Petitioner's rule that is more likely to increase delay as well as to place a large burden on the federal courts. This is true because California's timeliness rules are extraordinarily difficult to apply, postcard denials present the most difficult questions of timeliness, and Petitioner's rule will create double work in cases in which the federal courts ultimately find that the state court petition at issue was, in fact, timely under state law.

Finally, Petitioner's rule risks compromising the intended function of the Great Writ, which is to protect individual rights embodied in the United States Constitution. Under Petitioner's rule, it is inevitable that there will be cases in which a federal court will misconstrue the law of California (or another state) in the wake of a state court's silence on the issue of timeliness. In such cases, the prisoners involved will have fully complied with AEDPA and, nonetheless, will have been stripped of any opportunity for federal habeas review. Not only is this possible under Petitioner's rule, but it is likely to occur in those very cases in which a constitutional violation has taken place.

For these reasons, this Court should adopt Respondent's presumption that a petition is "pending" under § 2244(d)(2) unless a state court gives *some indication* that the prisoner's prior state court filing was untimely. Because the Ninth Circuit properly applied such a presumption to the facts of Mr. Chavis' case, the decision below should be affirmed.

ARGUMENT

I. The Question Presented By This Case Has Not Previously Been Resolved By This Court and Is Not Answered By the Text of AEDPA.

Although it contains a scant 37 words, the importance of 28 U.S.C. § 2244(d)(2) cannot be underestimated. This Court has previously granted certiorari on four separate occasions to resolve disputes over the proper interpretation of language in this tolling provision. *Artuz v. Bennett*, 531 U.S. 4 (2000) (interpreting the words "properly filed"); *Duncan v. Walker*, 533 U.S. 167 (2001) (interpreting the words "application for State post-conviction or other collateral review"); *Carey v. Saffold*, 536 U.S. 214 (2002) (interpreting the word "pending"); *Pace v. DiGuglielmo*, 125 S. Ct. 1807 (2005) (again interpreting the words "properly filed").

As noted above, this case presents an important question regarding the proper application of the statute that has never been resolved by this Court. The question is:

> When a warden argues that a prisoner is not entitled to tolling of AEDPA's statute of limitations under 28 U.S.C. § 2244(d)(2) because one of the prisoner's prior state filings was untimely (according to the warden) under state law *but* the state court gave no indication that the filing was untimely, should the federal court presume that the application was "pending" (as the Ninth Circuit did and the Respondent urges) or should the federal court engage in an independent determination of whether the filing was timely under state law (as Petitioner urges)?

There are only four options available to the federal court in such a situation: (i) the federal court could ask the state court to clarify whether the filing was untimely under state law; (ii) the federal court could presume that the state application *was not "pending"* unless the state court made an explicit finding that it was timely filed under state law; (iii) the federal court could presume that the state application *was "pending"* unless the state court gave some indication that the petition was untimely filed under state law; or (iv) the federal court could engage in its own independent factual analysis and application of state law to determine whether the filing was timely. The first two of these options can be easily rejected, and are supported by neither Petitioner nor Respondent in this case.[6] The third option—

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6. The first option—certification—may be desirable when, as in *Saffold*, the state court has made an ambiguous statement that might constitute a finding of untimeliness under state law. Certification would be inappropriate, however, in the face of state court silence regarding the issue because it would (1) result in a deluge of certification requests, (2) be unavailable in states that either do not allow certification or do not allow certification from district courts, and (3) have limited—if any—value in the event the state court did not respond or there was unacceptable delay in the response. *Cf. Arizona v. Evans*, 514 U.S. 1, 7 (1995) (noting "the unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court"); *Michigan v. Long*, 463 U.S. 1032, 1039-40 (1983) (noting that certification is "unsatisfactory both because of the delay and decrease in efficiency of judicial administration and, more important, because [it] place[s] significant burdens on state courts to demonstrate the presence or absence of our jurisdiction"). The second alternative similarly lacks merit as there is no reason to believe that Congress intended to predicate statutory tolling on a state court's explicit finding of timeliness. Thus, as both Petitioner and Respondent concede, the relevant choice is between a presumption that the application was "pending" or independent federal adjudication of timeliness pursuant to state law.

adopted by the Ninth Circuit—is the position urged by Respondent in this case. The fourth option is the position urged by Petitioner.

The Court's decision in this matter should be animated by a desire to advance the objectives of AEDPA (*i.e.*, comity, finality, and federalism), preserve the limited resources of the federal judiciary, and guard the role of the federal courts in ensuring that innocent individuals are not being incarcerated and that the federal constitutional rights of these individuals are preserved.

Rather than directly confront the difficult question of which rule better promotes these aims, however, Petitioner instead takes the untenable position that the issue has already been settled by this Court. Pet. Br. 19 ("The decision below is, on its face, in direct conflict with this Court's decision in *Saffold*."). As explained below, Petitioner is mistaken. The question presented by this case was neither decided nor even addressed by this Court in *Saffold*. Moreover, as Petitioner concedes, the question presented cannot be resolved by merely interpreting the text of § 2244(d)(2). Put simply, the question squarely presented by this case is an open one and it must be answered by determining which rule better advances the purposes of AEDPA and of the Great Writ.

A. The Question Presented Was Neither Decided Nor Even Addressed in *Carey v. Saffold*.

AEDPA's tolling provision provides that:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is

> pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2). In *Saffold*, this Court held that an application for state collateral review is "pending" in California during the time between the denial of a state habeas petition and the filing of a further original state habeas petition in a higher court *as long as* the latter petition was timely filed under California state law. *See Saffold*, 536 U.S. at 221, 225 – 226.[7]

Petitioner asserts that this Court in *Saffold* issued a "clear instruction to the federal courts to look to and apply state timeliness standards." Pet. Br. 16. But the Court in *Saffold* said no such thing; it stated only that the Ninth Circuit should determine whether *the California Supreme Court* found Mr. Saffold's petition to be untimely.[8] As this Court has subsequently noted:

> In *Saffold*, we considered whether § 2244(d)(2) required tolling during the 4½ months between the California appellate court's denial of Saffold's postconviction petition and his further petition in the California Supreme Court. The California Supreme Court denied the petition "on the merits and for lack of diligence," which raised the question

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7. Similarly, this Court recently announced that—for purposes of § 2244(d)(2)—a petition is not "properly filed" if it is untimely under state law. *Pace*, 125 S. Ct. at 1812.

8. Indeed, the very language employed by the Petitioner in making his argument implicitly concedes that *Saffold* contained no such explicit directive. In Petitioner's words, "this Court [in *Saffold*] *contemplated* that the federal courts would determine for themselves whether a state application was timely in the absence of a clear ruling from the state court." Pet. Br. 16 (emphasis added).

> whether *that court* had dismissed for lack of merit, for untimeliness, or for both.

Pace, 125 S. Ct. at 1812 (emphasis added).

This Court gave no instruction to the Court of Appeals regarding what to do if it could not determine what the California Supreme Court meant by its ambiguous reference to Mr. Saffold's "lack of diligence." Instead, this Court merely stated:

> We leave it to the Court of Appeals to evaluate these and any other relevant considerations in the first instance. We also leave to the Court of Appeals the decision whether it would be appropriate to certify a question to the California Supreme Court for the purposes of seeking clarification in this area of state law.

Saffold, 536 U.S. at 226 – 227.[9]

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9. On remand, the Ninth Circuit found that the California Supreme Court's denial "on the merits and for lack of diligence" referred to Mr. Saffold's lack of diligence in initially filing his habeas petition in state court (a time period that was irrelevant to the AEDPA statute of limitations), not to Mr. Saffold's delay in filing his petition before the state supreme court (an interval that would have rendered his federal petition untimely unless he was entitled to interval tolling). *Saffold v. Carey*, 312 F.3d 1031, 1035-36 (9th Cir. 2002). Because the Ninth Circuit concluded that the state court had not held that Mr. Saffold's delay during the relevant time period was inappropriate, it concluded that Mr. Saffold was entitled to interval tolling and that his federal petition was not barred by AEDPA's statute of limitation. *Id.* at 1036. This series of events demonstrates that the Ninth Circuit understood this Court's remand order in *Saffold* as an instruction to determine whether the *state court* denied the petition as untimely and did not interpret this Court's

(Cont'd)

In refusing to articulate a rule regarding what federal courts must do if they cannot ascertain the meaning of an ambiguous state court reference to untimeliness, the *Saffold* Court necessarily left open the very question presented by this case: What is a federal court to do when the state court is *silent* on the issue of whether the prisoner's filing was timely under state law?

Thus, *Saffold* does not endorse (either explicitly or implicitly) Petitioner's proposed rule, *i.e.*, that a federal court must conduct an independent determination of timeliness under state law when the state court has given no indication that a prior state petition was untimely. Indeed, this Court's recent opinion in *Gonzalez v. Crosby*, 125 S. Ct. 2641 (2005), suggests that this Court has already implicitly *rejected* precisely such a rule:

> Although respondent contends that petitioner's motion for state postconviction relief was untimely, and that the District Court's denial of statutory tolling was therefore correct under *Pace v. DiGuglielmo*, 544 U.S. __, 125 S. Ct. 1807, 161 L.Ed. 669 (2005), *the Florida courts made no reference to untimeliness in dismissing petitioner's motion.*

Gonzalez, 125 S. Ct. at 2560 n.8 (emphasis added). Although *Gonzalez* involved the issue of whether a prior state habeas

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(Cont'd)

decision in *Saffold* to mean that it should conduct an independent determination of the reasonableness of the petitioner's delay under state law. *See also Chavis v. LeMarque*, 382 F.3d 921, 926 (9th Cir. 2004) (stating that on remand in *Saffold* the Ninth Circuit rejected the contention that it must determine the reasonableness of delay under state law "and held that the relevant inquiry is whether the state court denied the petition as untimely").

petition was "properly filed" under § 2244(d)(2), this is a distinction without a difference. If, in the wake of state court silence, an independent federal inquiry regarding timeliness is inappropriate for purposes of determining if a petition was "properly filed" under § 2244(d)(2), it can be no more appropriate for purposes of determining if a petition was "pending" under the same statute.

The proper outcome of the present case is accordingly not answered by *Saffold*; indeed, if anything, this Court's precedent—particularly *Gonzalez*—provides more support for Respondent's position than it does for Petitioner's.

B. The Question Presented Is Not Answered By the Text of § 2244(d)(2).

Conspicuously absent from Petitioner's opening brief is any suggestion that the text of § 2244(d)(2) requires a federal court, when confronted with a "postcard" denial of a state habeas petition, to conduct an independent determination of timeliness. This is true for good reason.

If the statute *required* the federal court to conduct an independent determination of timeliness in the case of a "postcard" denial, then it would also *require* the federal court to conduct an independent determination in those cases where the state court had *explicitly* ruled that the petition was either timely or untimely. This is so because nothing prevents a state court from erroneously determining the facts (*e.g.*, that a document was filed on a particular date or that a particular excuse for a delayed filing was credible) or erroneously applying its law in any given case.[10] Therefore, if "pending" meant that a

10. As this Court has noted, findings of state law by lower state court tribunals are not dispositive interpretations of state law and may be erroneous even under state law. *See Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967).

federal court was compelled to assure itself, without the use of any presumptions, that a petition was timely under state law, it would require an independent inquiry in all cases.

This Court has already twice rejected such a reading of the statute. *See Saffold*, 536 U.S. at 226 ("If the California Supreme Court had clearly ruled that Saffold's 4½-month delay was 'unreasonable,' *that would be the end of the matter*. . . .") (emphasis added); *Pace*, 125 S. Ct. at 1812, 1814 ("*Because the state court rejected petitioner's PCRA petition as untimely*, it was not 'properly filed,' and he is not entitled to statutory tolling under § 2244(d)(2).") (emphasis added). In other words, both *Saffold* and *Pace* instruct the federal courts to *presume* that the state court correctly applied its own law, and such presumptions—even conclusive ones (as in *Saffold* and *Pace*)—are entirely consistent with both the statutory text and purpose of AEDPA.

Of course, this does not establish that every presumption is appropriate. What it does show is that by conditioning the federal right to toll AEDPA's limitations period on whether an application was pending under state law, Congress enacted a statute that permits—indeed, that invites—federal courts to make *appropriate* presumptions regarding whether a prisoner's state application was pending. Such presumptions are appropriate where they advance the purposes of AEDPA and of the Great Writ, as does the presumption employed by the Ninth Circuit in this case.

Moreover, although the three-year delay in this particular case is somewhat lengthy, § 2244(d)(2) unambiguously does not prohibit tolling merely because the state collateral proceedings took a long time. As long as state proceedings are "pending," § 2244(d)(2) provides for tolling. It is for this same

reason that § 2244(d)(2) grants tolling even to second, third, or subsequent state habeas petitions, as long as they are proper under state law. *See Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998).

Similarly, AEDPA does not attempt to prevent states from fashioning their own state habeas regimes and timelines, even when such procedures may necessarily (or in a particular case) result in *extensive* delays before the filing of a federal habeas petition. To take an extreme example, § 2244(d)(2) would grant tolling for even 25-year delays if California (or any other state) elected to establish a 25-year time limit in which a prisoner could file a direct appeal to the California Supreme Court from the denial of his habeas petition by the California Court of Appeal. Moreover, as applicable here, AEDPA indisputably grants tolling even in cases that involve years-long delay so long as state law— whether pursuant to a "reasonableness" doctrine or any other statutory or common law principle— authorizes such delay.

Put simply, the goal of AEDPA's statute of limitations is to ensure that federal petitions are filed expeditiously *once state proceedings have finally been concluded*. The fact that California, or any other state, may allow a three-year (or longer) delay, pursuant to state law, in between the conclusion of intermediate appellate proceedings and the filing of a habeas petition in the state supreme court is entirely consistent with both the purpose and text of AEDPA.

The central question, then, is not whether there has been a three-year delay, because California state law indisputably allows such a delay in particular cases, and AEDPA clearly provides tolling if such a delay is permitted under state law. Rather, the dispositive question here is whether the timeliness

of such a state law petition should be determined by California state courts or by independent federal adjudication of this state law issue. When the California state court has given no indication that the filing was untimely, should the federal court presume that the prisoner's application was "pending," or should the federal court instead make its own determination pursuant to its own understanding of California state law?

II. Respondent's Presumption Is Most Consistent with the Purposes of AEDPA and the Great Writ.

Within the limits of statutory language and controlling precedent, AEDPA—like any statute—should be applied in a way that furthers its purpose. *See Rose v. Lundy*, 544 U.S. 509, 516-17 (1982) ("Because the legislative history of § 2254 [of AEDPA], as well as the pre-1948 cases, contains no reference to the problem of mixed petitions, in all likelihood Congress never thought of the problem. Consequently, we must analyze the policies underlying the statutory provision to determine its proper scope.").

A. Respondent's Presumption Furthers the Purpose of § 2244(d)(2).

Congress enacted AEDPA to further the principles of federalism, comity, and finality. *Williams v. Taylor*, 529 U.S. 420, 436 (2000) ("There is no doubt Congress intended AEDPA to advance these doctrines"). Of course, the different provisions of AEDPA operate to promote the goals of federalism, comity, and finality in different ways. *See Walker*, 533 U.S. at 178-79; *see also Williams*, 529 U.S. at 436 (stating that "[f]ederal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts," and describing the relationship as a "delicate balance").

In particular, "[t]he 1-year limitation period of § 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state court judgments. . . . This provision reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Walker*, 533 U.S. at 179 (citations omitted). The exhaustion requirement, on the other hand, promotes comity and federalism because it requires prisoners to invoke "one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Thus, as this Court has recognized, the exhaustion requirement "ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment." *Walker*, 533 U.S. at 178-79.

Unfortunately, the goals of finality, comity and federalism can sometimes work in opposition to each other, and AEDPA provides one such instance. The process of exhaustion takes time, and thus lengthens the period during which the prisoner's conviction is subject to collateral challenge. This extended period of uncertainty undercuts the state's interest in finality. The tolling provision of § 2244(d)(2), however, "balances the interests served by the exhaustion requirement and the limitation period." *Walker*, 533 U.S. at 179. It promotes exhaustion by protecting a prisoner's ability to pursue state remedies without losing the opportunity later to apply for federal habeas relief. *See id.* And it simultaneously safeguards the States' interest in the finality of their judgments by tolling the federal limitations period only while "properly filed applications for State post-conviction or other collateral review" are pending. *See id.* at 179-80; 28 U.S. § 2244(d)(2).

As explained below, Respondent's rule is far more faithful than Petitioner's to the careful balance struck in § 2244(d)(2) between the sometimes-competing principles of federalism, comity and finality.

1. Respondent's Presumption Promotes Federalism.

If Petitioner's rule is adopted, federal courts will routinely "second-guess" a state court's determination of state law, because they will be evaluating lack of diligence arguments that the California courts could have relied on *but chose not to*. If the California Supreme Court issued a "postcard" denial rather than a written opinion (or at least a denial with a citation to legal authority), it may well have considered the case an inappropriate vehicle through which to contribute to the body of state timeliness law. Alternatively, the California state court may have been of the opinion that it would be unfair to deny the petition on a procedural basis because the case was too close to call. Yet another alternative—one expressly recognized even by Petitioner—is that the postcard denial results from a *disagreement between the judges about the importance of enforcing California's procedural rules*. Pet. Br. 24.

Accordingly, under Petitioner's rule, federal courts will announce—and necessarily affect—California law regarding timeliness where the state courts, for any number of good reasons, felt it inappropriate to do so. This is a necessary and inevitable result of independent federal adjudication of timeliness in the face of state court silence on this issue. The *extent* of this intrusion may or may not result in federal courts significantly altering the content of California law. Regardless, the *existence* of this intrusion is anathema to federalism. Respondent's presumption leaves it up to California

to apply (and assures that it remains) California's law of timeliness, properly applied by the appropriate entities in our federal system.

Petitioner argues that it is Respondent's presumption that truly interferes with state judicial decision making because it would "force" the state courts to "state in every habeas case whether the petition was timely." Pet. Br. 38. This is not so. Respondent's presumption will only require the state courts to make an explicit determination of timeliness in those cases where the state court *wishes to foreclose statutory tolling under § 2244(d)(2)*. If the state court determines—in any given case—that it is more important to avoid making an explicit ruling on timeliness than it is to foreclose statutory tolling under AEDPA, it remains free to do so. As this Court has long recognized in a similar context, the state court can accomplish this end quickly and easily. *Cf. Harris v. Reed*, 489 U.S. 255, 265 n.10 (1989) ("[A] state court that wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of procedural default.'").

This is not the first time this Court has been forced to make such a choice. It addressed a nearly identical balance in *Harris v. Reed*. At issue in *Harris* was whether this Court should adopt a rule that required state courts to make an express procedural default determination if they wished to preclude federal habeas review on state law grounds. The alternative, just as it is here, was to allow federal courts to make an independent determination and application of state law to such petitions. This Court concluded in *Harris* that it would be far less destructive to federalism to require state courts to make an affirmative finding of procedural default under state law than a contrary rule that would require federal courts to conduct an

independent determination of such state law issues. This Court stated:

> Respondents claim that applying the *Long* "plain statement" requirement to habeas cases would harm the interests of finality, federalism, and comity. This Court has been alert in recognizing that federal habeas review touches upon these significant state interests. . . . We believe, however, that applying *Long* to habeas burdens those interests only minimally, if at all. The benefits, by contrast, are substantial. A state court remains free under the *Long* rule to rely upon a state procedural bar and thereby to foreclose federal habeas review to the extent permitted by *Sykes*. Requiring a state court to be explicit in its reliance on a procedural default does not interfere unduly with state judicial decisionmaking. As *Long* itself recognized, it would be more intrusive for a federal court to second-guess a state court's determination of state law.

Harris, 489 U.S. at 264. So too here. The Ninth Circuit's rule would require only that state courts make a finding of untimeliness in order to preclude tolling under AEDPA, and, as in *Harris*, such a requirement "does not interfere unduly with state judicial decisionmaking." *Id.* By contrast, Petitioner's rule would require federal courts to second-guess the deliberate decision of a state court not to reach the timeliness issue, and would necessarily involve the adjudication of this sensitive state law issue by a federal court. As in *Harris*, such a result "would be far more intrusive" on both state decisionmaking and on the interests of federalism than would the rule advanced by Respondent. *Id.* The core federalism concerns that underlie AEDPA accordingly militate strongly against the rule advanced by Petitioner and in favor of the rule advanced by Respondent.

2. Respondent's Presumption Promotes Comity.

Section 2244(d)(2) was designed to provide "a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts." *Walker*, 533 U.S. at 180. This Court has recognized that although other provisions, such as the exhaustion requirement of § 2254(b), provide individuals with good reason to exhaust state remedies, § 2244(d)(2) cannot be construed properly in a manner that is "out of step" with AEDPA's deliberate goal of promoting the exhaustion of remedies. *Id.*

Petitioner's rule is out of step with AEDPA's design because it encourages prisoners to make premature state and federal court habeas filings. Under Petitioner's rule, any prisoner who incurred any nontrivial delay in filing a habeas petition in the California Supreme Court faces two risks: (1) that the California Supreme Court might find the petition to be untimely, and (2) that the federal courts might find the petition to be untimely, thereby barring federal habeas review under AEDPA. Moreover, these risks would be additive; under Petitioner's rule, a habeas petitioner would incur the risk of (2)—a federal untimeliness finding—even if he successfully avoided a state court untimeliness finding under (1) because the state court, for whatever reason, elected not to declare the petition untimely (*e.g.*, to issue a "postcard" denial).

Those who exhaust their state remedies under Petitioner's rule will accordingly bear the burden of proving the timeliness of their state petitions under California law not once, but twice—once before the California courts, and then again before a federal court conducting independent review. Even if the hurdle were the same height both times, having to jump it twice would increase the risk that a state petition will be found untimely and hence that it will not toll the AEDPA limitations period.

Consequently, Petitioner's rule will result in two adverse effects, both of which have deleterious consequences. First, the risk that a delay in promptly concluding state court habeas remedies might result in an independent federal determination of untimeliness would increase the incentive for prisoners to file federal protective habeas petitions without awaiting final determinations on their state petitions to ensure that their federal petitions are not barred by § 2244(d)(1).[11] Such protective habeas filings will both burden the federal system and conflict with the purpose of AEDPA in ensuring that, in the interests of comity, state courts are permitted to resolve habeas petitions in their own tribunals prior to the intervention of the federal courts.

Second, the heightened risk of untimeliness findings that necessarily arises from the involvement of a second decision-maker will also result in a decision by prisoners to forego delay in the state habeas system even in those situations in which the state system would *prefer* such delay. California has, as noted above, deliberately created a flexible state habeas filing regime in which a petition before a California state court need only be filed within a "reasonable" period of time, rather than (as in almost all other States) within a set period. This procedural regime advances a variety of state interests. For example, it encourages more complete (and articulate) state habeas filings and ensures that state habeas petitions include all facts and evidence available to the petitioner, even if successfully obtained only after prolonged investigation. Under Petitioner's rule, however, a state habeas petitioner will be more likely to file

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11. If the Court accepts Petitioner's rule in this case, federal courts will also have to make independent determinations of timeliness in the face of silent denials *in all 50 states* in order to determine if the state court petition was "properly filed." *See Pace*, 125 S. Ct. at 1814. This will further increase the incentive for prisoners to file protective filings in federal court.

prematurely a petition before the California Court of Appeal or California Supreme Court for fear that any significant delay in filing such a petition may result in an independent federal determination of untimeliness *even if the California state court makes no such finding*. In this manner, Petitioner's proposed rule would conflict not only with the purposes of AEDPA, but would also frustrate California's interest in establishing and applying its own state law habeas regime.

Respondent's rule, by contrast, sacrifices none of these important principles and instead ensures that California remains responsible for ensuring and faithfully applying California's own state law timeliness rules. Such a result is preferable under AEDPA and advances the significant interests in comity that underlie the statute.

3. Respondent's Presumption Does Not Compromise Finality.

Petitioner suggests that Respondent's presumption will compromise the state's compelling interest in ensuring the finality of its criminal judgments. Pet. Br. 37 – 38. This argument should be rejected for three reasons.

First, Petitioner's argument is predicated on the mistaken notion that Respondent's presumption will delay the resolution of federal habeas cases. As explained in detail in Section II.B., *infra*, there is no reason to believe that Respondent's presumption will result in such delay. To the contrary, Respondent's presumption is more likely to streamline the resolution of federal habeas cases thereby conserving limited federal resources as well as advancing the state's interest in finality.

Second, Respondent's presumption provides the state of California with every opportunity to fully protect its interest in finality. California state courts can foreclose federal review by explicitly finding a state petition to be untimely. Alternatively, the California legislature (like 48 other states) can impose a set period of time by which a prisoner must file his state petition. Given these options, either of which may easily be invoked by the state, it is disingenuous to invoke the state's own interest in finality as an excuse for the federal court to engage in an independent analysis of state law—particularly when such an independent analysis will (i) substantially burden the federal courts (as described in Section II.B., *infra*) and (ii) violate principles of federalism and comity (as described in Section II.A.1. and 2., *supra*).

Finally, any concern that Respondent's presumption will allow prisoners to indefinitely toll AEDPA's statute of limitations is flatly unwarranted. As Petitioner notes, California does enforce its own timeliness standards. Pet. Br. 25 – 26. Thus, in cases of clear delay, the California state courts will give some indication that the petition at issue is untimely. *See In re Wells*, 434 P.2d 613, 615 (Cal. 1967) (finding petition to be untimely because of 19-year delay); *In re White*, 18 Cal. Rptr. 3d 444, 466 (Cal. Ct. App. 2004) (finding petition to be untimely because of 10-year delay); *In re Johnson*, 53 Cal. Rptr. 1 (Cal. Ct. App. 1966) (finding petition to be untimely because of 11-year delay).

4. Petitioner's Arguments Have Already Been Rejected By This Court in *Long* and *Harris*.

This Court has long recognized that requiring a state court to be explicit in its reliance on a procedural default best serves the interests of federalism, comity, and finality. In *Michigan v. Long*, this Court adopted a "'plain statement' rule," holding that

a federal court has jurisdiction to review a state court judgment unless the state court clearly expressed reliance on an adequate and independent state-law ground. *Michigan v. Long*, 463 U.S. 1032, 1042 and n.7 (1983). In *Harris v. Reed*, this Court extended that rule to the federal habeas context: "Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris*, 489 U.S. at 263. Although the *Long* and *Harris* presumptions are not controlling in this case, the question at issue here presents the identical problem of how best to protect the significant state interests of federalism, comity, and finality while also enabling federal courts to review—and, where necessary, to vindicate—federal rights. The balance struck in the independent and adequate state-law grounds context is the correct one.

B. Respondent's Rule Is More Likely to Streamline the Resolution of Federal Habeas Cases.

Petitioner intimates that Respondent's presumption runs counter to the purpose of AEPDA because it will compromise the states' interest in finality by causing substantial delay in the resolution of federal habeas cases. Pet. Br. 35. Petitioner is mistaken. For the reasons explained below, Respondent's rule is unlikely to create more delay in the resolution of federal habeas cases than would Petitioner's rule.[12] Indeed, Respondent's

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12. In the words of one noted former California state court jurist, "In theory, consistent application of procedural bars imposes discipline on defense counsel and discourages abusive tactics. However, our efforts to curb lawyer excesses may come at too high a cost—at the expense of reasonably expeditious resolution of these cases." *In re Gallego*, 959 P.2d 290, 304 (Cal. 1998) (Brown, J., concurring and dissenting).

presumption is more likely to *expedite* the resolution of federal habeas cases and reduce the burden placed on the federal courts. Thus, it is Respondent's rule, not Petitioner's, that serves Congress' intent in enacting AEDPA.

1. The Two Rules Achieve Identical Results When a Petition Clearly Has No Merit.

In describing why, in most cases where a "postcard" denial was issued, California state courts do not reach the issue of whether the relevant state court petition was timely filed, Petitioner correctly notes:

> The state appellate court can therefore act both expeditiously and fairly by first considering the issue that can most easily be resolved from the information before it. Accordingly, many petitions can be, and are, denied because they do not present a prima facie case without the court ever even reaching the question of timeliness. . . . This practice of making a preliminary assessment of the petition is actually very similar to the preliminary review of a petition for writ of habeas corpus conducted by the federal courts under Rule 4 of the Rules Governing Section 2254 Cases. Under that rule, '[I]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition. . . .' As in California practice, the rule permits the court to 'screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer.' *The rule plainly permits the federal district court to summarily dismiss a petition for failure to make a prima facie case for relief.*

Pet. Br. 20-21 (citations omitted) (emphasis added). What Petitioner fails to recognize, however, is that—for this very reason—Respondent's presumption is, in practice, no different than the independent determination rule urged by Petitioner in cases where the federal habeas petition clearly has no merit. According to Petitioner, such cases comprise the vast majority of the thousands of habeas cases filed each year in California. Pet. Br. 23-24.

Under Respondent's rule, the federal court would be required to reach the merits of petitions when the state court is silent. If the federal petition in question, however, fails to state a prima facie case, the federal court has at its disposal Rule 4 of the Rules Governing Section 2254. Thus, like the state court before it, the federal court will summarily dismiss the petition.

Under Petitioner's rule, by contrast, the federal court can—instead of addressing the merits—conduct its own independent analysis of state law to determine whether the relevant state court petition was untimely. If the federal petition in question, however, fails to state a prima facie case, the federal court has at its disposal Rule 4 of the Rules Governing Section 2254. For this reason, it will not conduct its own independent analysis of state law. Rather, like the state court before it *and like the federal court acting under Respondent's rule*, the federal court will summarily dismiss the petition.

Thus, Petitioner's argument that Respondent's presumption is "manifestly contrary to Congress's intent in enacting AEDPA," Pet. Br. 37, because it will create delay in thousands of California cases each year is belied by the realities of actual habeas practice. In truth, the rules urged by Petitioner and Respondent will only

produce different results in those cases where a prisoner may have raised legitimate constitutional claims.[13]

2. Respondent's Rule Is More Likely to Streamline the Resolution of Petitions That May Raise Legitimate Constitutional Claims.

As explained above, the only cases in which the choice between the rules urged by Petitioner and Respondent will have any practical significance are those in which a prisoner's federal habeas petition *does* state a prima facie case. In such cases, however, Petitioner's rule does nothing more than unnecessarily complicate and delay the federal habeas process.

a. Even in those cases where Petitioner's rule is both dispositive and reliable, it is burdensome and dilatory.

As explained above, Petitioner's rule provides the federal courts with an additional basis on which a prisoner's federal habeas petition may be dismissed. Despite state court silence, the petition could be dismissed as time-barred under AEDPA if statutory interval tolling is needed in order for a prisoner's petition to remain within AEDPA's statute of limitations and the federal court independently determines that the prisoner's prior state court petition was untimely under state law. In such cases, the inquiry would stop (*i.e.*, the court would not need to

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13. For this reason alone, Petitioner's rule is particularly unwise. In the very cases that are most likely to present constitutional violations, Petitioner's rule risks foreclosing federal review to prisoners who properly complied with the state's procedural rules. *See* Section II.C., *infra*. Petitioner's rule does so without conveying *any* corresponding benefit in those cases in which prisoners have clearly *not* asserted a legitimate constitutional violation.

reach the merits). This might facially appear to create less burden and delay than Respondent's rule, which would require the federal court to reach the merits. Not so. For the following reasons, such a rejection on timeliness grounds—even if correctly decided by the federal court[14] is often likely to take more time and effort than the merits review that would be required under Respondent's rule.

i. California's timeliness rules are extraordinarily difficult to apply.

In California, a petition for collateral relief is timely filed as long as the prisoner either files without "substantial delay" or demonstrates "good cause" for the substantial delay. *See In re Harris*, 855 P.2d 391, 398 (Cal. 1993) ("[A] petitioner seeking relief on habeas corpus need only file a petition without substantial delay, or if delayed, adequately explain the delay."). Under California law, however, there is no general period of delay that triggers a presumption that it was "substantial." Nor is there a bright-line rule to determine whether there is "good cause" for the substantial delay. Indeed, under state law, delays of several months—or even years—are often deemed timely.[15] As a result, determining whether a prisoner has engaged

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14. Of course, if the federal court errs in its conclusion that the petition is untimely under state law, then it has wrongfully deprived the petitioner of federal review, in direct contravention of AEDPA, which permits statutory interval tolling when a state petition is timely filed.

15. *See In re Sanders*, 981 P.2d 1038, 1056 (Cal. 1999) (holding that petition was not time-barred, despite three-and-a-half year delay between the date on which the conviction became final and the filing of the first petition in state court, because attorney abandonment constitutes good cause for delay); *In re Stankewitz*, 708 P.2d 1260, 1262 and n.1 (Cal. 1985) (granting a habeas petition containing allegations of jury

(Cont'd)

in "substantial delay" and whether the "substantial delay" is excused by "good cause" necessarily requires a highly fact intensive and case specific inquiry.[16]

Under California state law, "[s]ubstantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." *In re Sanders*, 981 P.2d 1038, 1042 – 1043 (Cal. 1999). A petitioner need not present a claim to the state courts if he

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(Cont'd)
misconduct despite a year-and-a-half-long delay in filing); *In re Huddleston*, 458 P.2d 507, 508 (Cal. 1969) ("The lapse of two and one-half years does not become unreasonable under the present circumstances."); *In re Moss*, 221 Cal. Rptr. 645, 649 (Cal. Ct. App. 1985) (finding a nine month delay to be "not significant" because petitioner could not obtain counsel); *In re Spears*, 204 Cal. Rptr. 333, 335 (Cal. Ct. App. 1984) (finding an eighteen month delay "not . . . significant" and also adequately explained by petitioner's circumstances); *In re Mitchell*, 437 P.2d 289, 292 (Cal. 1968) (finding petitioner's "ignorance of the law and legal procedures" sufficient to justify a delay of two years).

16. This is particularly true in capital cases where

> the claims . . . are seldom fewer than 10 and often more than 50, with many of the claims encompassing several subclaims and supported by facts that the petitioner or his counsel have discovered at various times. Determining the timeliness of each claim and subclaim in such a petition becomes extraordinarily complex, particularly in light of the tension between the timeliness requirement and the rule against piecemeal presentation of claims.

In re Robbins, 959 P.2d 311, 343 (Cal. 1998) (Kennard, J., concurring and dissenting).

knows only the "triggering facts—*i.e.*, facts sufficient to warrant investigation," but he must present the claim if he knows or reasonably should know of information "sufficient to state a prima facie case." *In re Gallego*, 959 P.2d at 296. Thus, in order to make the initial determination of whether substantial delay has occurred, a court must examine each claim asserted, the facts submitted in support of each claim, and the legal bases for each claim. The court must then decide when the prisoner learned, or reasonably should have learned, of these facts and legal bases. And the court must decide whether the information was sufficient to state a prima facie case (thereby triggering the duty to present the claim) or simply sufficient to trigger the prisoner's duty to investigate the claim. *See id.* Finally, the court must determine whether the delay between the discovery date and the filing date was in fact "substantial." Thus, even this initial determination of whether there has been substantial delay often involves a detailed and highly fact specific evidentiary inquiry. *See, e.g. In re Gallego*, 959 P.2d at 298 – 300.

In those cases in which the federal court finds there to have been a substantial delay, the court will then be required to determine whether there was "good cause" for the delay. *See Harris*, 855 P.2d at 398. Just as in determining whether a prisoner engaged in "substantial delay", this inquiry into "good cause" will often involve difficult factual determinations. Mr. Chavis' case is illustrative. He alleges that his delay was caused by, *inter alia*, the fact that he was (i) constructively denied access to the prison law library, and (ii) subjected to repeated lockdowns. Of course, there are other grounds for "good cause" under California law as well:

> Good cause for substantial delay may be established if, for example, the petitioner can demonstrate that because he or she was conducting an ongoing

> investigation into at least one potentially meritorious claim, the petitioner delayed presentation of one or more other known claims in order to avoid the piecemeal presentation of claims.

In re Robbins, 959 P.2d 311, 318 (Cal. 1998).

Because of the fact intensive and case specific nature of the inquiry required to determine timeliness under California law, Petitioner's rule is unlikely to result in less delay than merely reaching the merits of these petitions.[17] As this Court is well aware, "it can take courts a significant amount of time to dispose of even those petitions that are not addressed on the merits; on the average, district courts took 268 days to dismiss petitions on procedural grounds."[18] As explained next, this is particularly true given the nature of "postcard" denials.

ii. "Postcard" denials present the most difficult questions of timeliness.

Petitioner spends a great deal of his opening brief explaining that under California practice, a "postcard" denial often issues

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17. While it is true that the adjudication of colorable constitutional claims is no easy task, the federal courts' special expertise is in interpreting federal statutes and the Constitution. *Cf. Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 827 (1986) ("The federal courts have acquired a considerable expertise in the interpretation and application of federal law.'") (Brennan, J., dissenting). Accordingly, as opposed to the fact-intensive adjudication of indeterminate state law timeliness issues that will result from Petitioner's rule, the adjudication of federal constitutional issues will be a far more familiar task.

18. *Walker*, 533 U.S. at 186 (Breyer, dissenting) (*citing* U. S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions 23-24 (1995)).

without the court reaching the issue of timeliness. Pet. Br. 20-25. In particular, Petitioner explains:

> [T]here are several reasons why California appellate courts may in fact not decide the issue of timeliness at the stage before a summary denial issues. First there has not yet been an adversarial process in which issues are identified and argued. . . . Second, often it will simply be easier to first examine whether the petitioner has made a prima facie case. As noted before, California's timeliness standard is indeterminate and there are several exceptions to the bar of untimeliness that require a fact-intensive inquiry.

Id. 21.

Respondent does not disagree with this description of California appellate practice. These facts, however, provide even more support for the proposition that Petitioner's rule contravenes the purpose of AEDPA by unnecessarily complicating and delaying the adjudication of federal habeas cases.

As explained above, adjudication of timeliness under California state law is almost always a challenging and time intensive exercise. Under Petitioner's rule, the federal courts will regularly have to conduct such timeliness inquiries in "postcard" denial cases—cases in which, as Petitioner admits, the state court did not comment upon timeliness because either (i) this issue was too difficult or fact-intensive to address, or (ii) a majority of the state court judges or justices were not able

to reach consensus. If, as Petitioner correctly argues, California enforces timeliness standards, Pet. Br. 25-26, the fact that the California courts have chosen not to reach the issue of timeliness in "postcard" denial cases speaks volumes about the substantial burden and delay that will result from Petitioner's proposed requirement that federal courts conduct an independent determination in such cases. If the state court, applying state law, feels that a determination of timeliness would be overly burdensome or disruptive, it is at least equally—if not more—burdensome for a federal court to independently ascertain the proper resolution of this state law issue.

b. In cases where Petitioner's rule is not dispositive, it creates double work for the federal courts.

In yet other cases, the federal court (employing Petitioner's rule) may ultimately decide that the state court petition was *timely*. In these cases, the federal court will need to proceed to the merits of the prisoner's petition. As a result of Petitioner's rule, the federal court—in such cases—has engaged in double the work that would be required under Respondent's rule.

In sum, Petitioner's rule will likely create more work for—and delay in—the federal courts, not less. *Cf. Harris*, 489 U.S. at 264-65 (rejecting similar result in analogous context because such a "proposed rule would impose substantial burdens on the federal courts. . . . Much time would be lost in reviewing legal and factual issues that the state court, familiar with state law and the record before it, is better suited to address

expeditiously."). This was not Congress' intent in enacting AEDPA.[19]

C. Respondent's Presumption Preserves the Intended Function of the Great Writ.

Federal courts have a primary obligation to protect individual rights embodied in the U.S. Constitution. *Harris,* 489 U.S. at 267 (Stevens, J. Concurring). In considering petitions under 28 U.S.C. § 2254, federal courts "perform the core function of vindicating federally protected rights." *Id.* When faced with an alternative, AEDPA should not be applied in a manner which forecloses such review.

Under Petitioner's rule, it is inevitable that there will be cases in which a federal court will misconstrue California law in the wake of a California state court's silence on the issue of timeliness and erroneously foreclose federal review to prisoners who have complied with the statute's exhaustion requirements by filing their petitions within AEDPA's statute of limitations. If there must be some error, it should be error on the side of allowing federal review. If a federal court reviews a petition that the state court would have rejected as untimely had it been forced to address the issue, there will be some compromise to finality, but the imposition on the state will be minimal, because the federal court will either agree that the petition lacks merit,

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19. Moreover, Petitioner's rule will extend far beyond California. In light of this Court's recent decision in *Pace*, whether a petition is "properly filed" can turn on whether a late-filed state application was "excused" and, thus, timely under that state's law. If the Court accepts Petitioner's rule in this case, federal courts will also have to make difficult independent determinations of timeliness and excuse *in all 50 states* in order to determine if the state court petition was "properly filed."

in which case the propriety of the state's judgment is merely reinforced, or the federal court will vindicate rights that the state should have upheld. In contrast, if a federal court fails to review a petition Congress meant for it to review under AEDPA, the petitioner will have been stripped unfairly of federal protection.[20] As explained in Part II.B.1 and 2, *supra*, Petitioner's rule runs this risk *in those very cases* in which it is most likely that a constitutional violation has occurred.

III. The Ninth Circuit Decision Should Be Affirmed Because It Properly Applied Respondent's Presumption to the Facts of Mr. Chavis' Case.

If this Court agrees with Respondent that it is permissible for a federal court to presume from a state court's silence that the prisoner's habeas petition was "pending," then it is beyond dispute that the Ninth Circuit correctly tolled the three-year interval between the entry of judgment in the California Court of Appeal and the filing of Mr. Chavis' petition in the California Supreme Court.

The California Supreme Court issued a "postcard" denial of Mr. Chavis' habeas petition; the court did not comment or cite any cases in its order. It merely stated that, "[t]he petition for writ of habeas corpus is DENIED." J.A. 32. As such, its order communicated nothing about whether Mr. Chavis had timely filed his petition. The Ninth Circuit was therefore justified in presuming that Mr. Chavis' application was "pending" in the three-year period preceding filing.

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20. This federal protection is of critical importance—particularly in light of the inherent fallibility of our criminal justice system. *See, e.g.*, Death Penalty Ino. Ctr., Innocence: Freed from Death Row, at http://www.deathpenaltyinfo.org/article.php?scid=6&did=110 (noting that since 1973, 121 people on death row have been exonerated and released) (last accessed on 9/18/05).

CONCLUSION

The Ninth Circuit validly employed a presumption that Mr. Chavis' petition was pending because the California Supreme Court was entirely silent on the issue of timeliness. The Ninth Circuit's use of this presumption does not contravene this Court's holding in *Saffold* or the language of § 2244(d)(2). It is more consistent with principles of federalism, comity, and finality than Petitioner's proposed rule, and it avoids the burden on federal courts that Petitioner's proposed rule would impose. For these reasons, this Court should affirm the Ninth Circuit's use of such a presumption and its decision to toll the statute of limitations in this case.

If, however, this Court chooses to adopt Petitioner's rule, it should remand this case for further proceedings to determine if Mr. Chavis' petition would be considered timely under California law. *See Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003) ("The District Court is in a better position to reweigh all the facts in the record in the first instance in light of our explication of retrogression."); *Reno v. Bossier Parish School District*, 520 U.S. 471, 490 (1997) (remanding because district court may have accorded improper weight to evidence); *see also Johnson v. California*, 125 S. Ct. 1141, 1152 (2005) (deciding that the Ninth Circuit employed an incorrect legal standard and allowing the Court of Appeals or the district court to apply the correct legal standard in the first instance) (citing *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 523, 557 – 558 (1994) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031 – 1032 (1992)).

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No. 04-721

In the
Supreme Court of the United States

MIKE EVANS, Warden

Petitioner,

v.

REGINALD CHAVIS,

Respondent.

On Writ of Certiorari
to the Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Did the Ninth Circuit contravene this Court's decision in *Carey v. Saffold* when it held that a prisoner who delayed more than three years before filing a habeas petition with the California Supreme Court did not "unreasonably" delay in filing the petition – and therefore was entitled to tolling during that entire period – because the California Supreme Court summarily denied the petition without comment or citation, which the Ninth Circuit construes as a denial "on the merits"?

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The NACDL, a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; foster the integrity, independence and expertise of the criminal defense profession; and promote the proper and fair administration of justice.[1] NACDL has 10,000 members nationwide -- joined by 80 state and local affiliate organizations with 28,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. The NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues. NACDL filed an *amicus* brief in *Carey v. Saffold*, a case central to the issues raised here.

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1. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than NACDL, made any monetary contribution to its preparation or submission. *See* Rule 37.6, Sup. Ct. Rules. The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court. Rule 37.3(a).

SUMMARY OF ARGUMENT

This case presents another opportunity to clarify the application of the tolling provision of 28 U.S.C. § 2244(d)(2), which stipulates that the one-year statute of limitations established in 28 U.S.C. § 2244(d)(1) shall be tolled while a "properly filed" application for post-conviction or other collateral review is "pending." The issue at the heart of this case is not, as it was in several recent cases before this Court, *what* constitutes a "properly filed" application. Rather, the issue is *who* decides whether an application, as a factual matter, was filed in compliance with state rules. The correct answer, *amicus* respectfully submits, is the state courts who are best positioned to interpret and enforce their own procedural filing requirements. Deference to express and implied state adjudications of issues regarding proper filing is consistent with this Court's interpretation of § 2244(d)(2), and as numerous federal circuit courts have recognized, with the fundamental principles that guide this Court's federal habeas jurisprudence.

To determine whether Mr. Chavis's state habeas petition in the California Supreme Court was properly filed so as to toll AEDPA's statute of limitations, a federal court should look to the actual basis of the California Supreme Court's denial of Mr. Chavis's petition. Applying principles borrowed from the related independent and adequate state ground doctrine, as articulated in *Harris v. Reed* and its progeny, the proper question is not whether there was some state procedural rule by which a federal claimant arguably failed to abide, as the State here contends, but rather whether the state courts actually determined that the claimant's application

was not properly filed and denied relief, in whole or in the alternative, on that basis.

Applying this approach, the Ninth Circuit properly concluded that no California Court ever determined, expressly or implicitly, that Mr. Chavis's petition was untimely under California's indeterminate requirement that filing of habeas petitions not be "unreasonably delayed." Contrary to Petitioner's argument, this Court's decision in *Carey v. Saffold*, 536 U.S. 214 (2002), is consistent with these broader procedural bar principles, and supports the Ninth Circuit's decision below. The Court's remand in *Saffold* underscores the important duty of federal courts to carefully evaluate, and defer to, the actual bases of state court rulings in applying AEDPA's tolling provision. Application of these principles here requires finding that Mr. Chavis's petition was not untimely as a matter of California law. Accordingly, the Ninth Circuit correctly ruled that Mr. Chavis's "properly filed" application tolled the statute of limitations.

ARGUMENT

I.

THE SAME CONSIDERATIONS OF COMITY AND FEDERALISM THAT UNDERLIE THE INDEPENDENT AND ADEQUATE STATE GROUND DOCTRINE REQUIRE FEDERAL COURTS APPLYING AEDPA'S TOLLING PROVISION TO DEFER TO STATE COURT DETERMINATIONS REGARDING WHETHER AN APPLICATION FOR COLLATERAL REVIEW COMPLIES WITH STATE FILING RULES.

This case falls at the confluence of two separate lines of this Court's jurisprudence. The first line of cases sheds light on the meaning of a "properly filed application" that is "pending" as those terms are used in the

Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(d)(2). *See Artuz v. Bennett*, 531 U.S. 4 (2000), *Carey v. Saffold*, 536 U.S. 214 (2002), *Pace v. DiGuglielmo*, 125 S. Ct. 1807 (2005). The second line of cases establishes the parameters of the relationship between state and federal courts in the context of habeas review, and deals more broadly with the degree of deference demanded of federal habeas courts reviewing state court decisions. *See Harris v. Reed*, 489 U.S. 255 (1989); *Coleman v. Thompson*, 501 U.S. 722 (1991), *Ylst v. Nunnemaker*, 501 U.S. 797 (1991). Although the questions raised in these separate lines of cases are distinct, *Bennett*, 531 U.S. at 9, they are nonetheless interrelated. An application may be properly filed, as this Court explained in *Bennett*, even if all of the claims presented in the application are procedurally barred. *Id.* at 10. The converse, however, is not true. An improperly filed application constitutes a procedural default and bars further collateral review of all the claims therein unless and until the defect in the filing is cured or waived. *See Daniels v. United States*, 532 U.S. 374, 381 (2001) (noting that "[p]rocedural barriers, such as statutes of limitations and rules concerning procedural default and exhaustion of remedies, operate to limit access to review on the merits of a constitutional claim"); *Coleman*, 501 U.S. at 744 (late filing of notice of appeal is independent and adequate state ground precluding federal review of constitutional claims).

Both lines of cases thus address a similar problem: determining when "a procedural default under state law forecloses federal relief on collateral attack." *Fernandez v. Sternes*, 227 F.3d 977, 978 (7th Cir. 2000). To solve that problem, they rely on a common methodology: they direct federal courts to look to state interpretations of

state law, and to defer to the decisions of the state courts with respect to those matters. Applying this methodology to the case at bar, this Court should conclude that the statute of limitations was tolled while Mr. Chavis exhausted his state remedies, because unlike in *Carey v. Saffold*, no California court has ever held, or even intimated, that Mr. Chavis's petition before the California Supreme Court was not timely under California law, nor do the circumstances surrounding the California Supreme Court's summary denial of that petition indicate that the denial was in fact based on untimeliness. Nothing in AEDPA, or in *Saffold*, indicates that Congress intended federal courts to scrutinize filings in state courts to determine, in the first instance, whether they complied with every conceivably applicable filing rule. The decision below should be affirmed.

A.

AEDPA Should Be Interpreted In Light of Well-Established Principles of Federal Habeas Law.

Whether a petition for post-conviction collateral relief is "properly filed" under 28 U.S.C. § 2244(d)(2) so as to trigger that section's tolling provisions must be considered "against the backdrop of federal habeas law dealing with procedurally barred claims" against which the AEDPA was enacted. *Villegas v. Johnson*, 184 F.3d 467, 470 (5th Cir. 1999). The independent and adequate state ground doctrine is a prominent feature of that backdrop. The doctrine is "grounded in concerns of comity and federalism," *Coleman v. Thompson*, 501 U.S. 722, 730 (1991), and is intended to give States the "first opportunity to address and correct alleged violations of state prisoner's federal rights." *Id.* at 731.

The independent and adequate state ground doctrine works hand-in-glove with the exhaustion doctrine to ensure that the States "have the first opportunity to address and correct alleged violations of state prisoners' federal rights." 501 U.S. at 731 ("independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases"); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) ("[T]he exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts").

AEDPA serves similar purposes. With its enactment, Congress sought to "reduce federal intrusion into state criminal proceedings," *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998) (citation omitted), and "accord greater deference to state court adjudications." *Id.* The tolling provisions of § 2244(d)(2) should be interpreted in light of these purposes. Like the independent and adequate state ground doctrine, AEDPA's tolling provision is intended to encourage claim exhaustion. *See Duncan v. Walker*, 533 U.S. 167, 180 (2001); *Villegas*, 184 F.3d at 471 (citing 28 U.S.C. § 2254(b)(1)). Although § 2244(d)(1) imposes a one-year statute of limitations for a state prisoner to seek federal habeas review, the tolling provision in § 2244(d)(2) permits the state courts to fully consider the prisoner's federal claims; without the tolling provision, the requirement that state prisoners exhaust state remedies before seeking federal review would be rendered meaningless, and state prisoners would be forced to choose between pursuing available state remedies or filing premature claims in federal court within the limitations period. *See Duncan*, 533 U.S. at 180 ("The tolling provision of § 2244(d)(2) balances the

interests served by the exhaustion requirement and the limitation period. Section 2244(d)(2) promotes the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued.").

AEDPA does not, however, purport to impose upon the states any mandatory procedural rules that all states must obey, or that somehow "trump" the state procedures established regarding the availability of post-conviction or other collateral review. As the Ninth Circuit decision below reflects, states are free to determine timeliness rules for obtaining relief in their courts. As the Court stated in *Carey v. Saffold*, 536 U.S. at 223, "it is the State's interests that the tolling provision seeks to protect, and the State, through its supreme court decisions or legislation, can explicate timing requirements more precisely should that prove necessary."

B.

THE INDEPENDENT AND ADEQUATE STATE GROUND DOCTRINE BARS FEDERAL REVIEW ONLY WHERE THE STATE COURT ACTUALLY RELIED ON THE PROCEDURAL BAR.

Generally, federal courts will not consider an issue of federal law, either on direct or habeas review, if "the judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision," *Harris v. Reed*, 489 U.S. at 260-261. Procedural bar – failure to comply with state procedural rules – can serve as such an independent and adequate state ground.

This Court explained in *Harris*, however, that "the mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim: '[T]he state court must actually have relied on the procedural bar as an independent basis for its disposition of the case.'" 489 U.S. at 261-262 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985)). *See also Michigan v. Long* 463 U.S. 1032, 1039 n.4 (1983) ("We may review a state case decided on a federal ground even if it is clear that there was an available state ground for decision on which the state court could properly have relied.") (citing *Beecher v. Alabama*, 389 U.S. 35, 37, n. 3 (1967)).

Accordingly, the central task before a federal court is to determine the actual basis of the controlling state court decision. This task is more difficult when, as here, the relevant decision does not clearly state the grounds of decision. To assist the federal courts, this Court has devised several interpretive principles. First, "when the decision 'fairly appears to rest primarily on federal law, or to be interwoven with the federal law," a federal court will address the petition "unless the state court's opinion contains a plain statement that [its] decision rests upon adequate and independent state grounds." *Harris*, 489 U.S. at 261 (quoting *Long*, 463 U.S. at 1042) (internal quotations omitted). The Court favored this approach in part because it relieved federal judges of the burden of independently "examining state law," a contrary approach was "unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar, and which often, as in this case, have not been discussed at length by the parties." *Long*, 463 U.S. at 1039.

The mere fact that a state court chooses to discuss the merits of a claim does not by itself preclude a finding that the state court decision was also based on an independent and adequate state ground. When a state decision indicates alternative grounds, federal review is generally barred under principles of procedural default as long as one of the alternative grounds was sufficient under state law to foreclose relief. *See Sochor v. Florida*, 504 U.S. 527, 533 (1992).

Where there is no indication that the state decision is invoking federal law, the *Harris* "plain statement" rule does not apply. *Coleman*, 501 U.S. 738. Even where the state decision is a mere summary dismissal, however, the court still must attempt to determine the basis of the state decision. In *Coleman*, this Court indicated that it was appropriate for a federal court to consider the context in which the summary denial was issued, such as whether the summary denial was issued in response to a motion predicated on an alleged procedural default. By looking beneath the face of the decision, the Court had no difficulty finding the basis of the Virginia Supreme Court's decision. *See* 501 U.S. at 740 ("The Virginia Supreme Court stated plainly that it was granting the Commonwealth's motion to dismiss the petition for appeal," which in turn "was based solely on Coleman's failure to meet the Supreme Court's time requirements.").

Ylst v. Nunnemaker, 501 U.S. 797 (1991), established an additional interpretive rule: "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." 501 U.S. at 803. The rule articulated in *Ylst* was based on the empirical presumption that "silence implies consent, not

the opposite." *Id.* at 804. The presumption is rebuttable, however, where "strong evidence" exists "that the presumption, as applied, is wrong." *Id.*

Harris, Coleman and *Ylst* all stand for the proposition that a federal court must look to the basis of the state court ruling to determine whether a petitioner's alleged noncompliance with a rule of state procedure establishes an adequate and independent ground to deny the requested relief. Where the state decision is ambiguous, these cases direct the federal court to take other evidence into account, including any "plain statement" of intent included in the state opinion, the language used by the state court, the context in which the decision was rendered, and the content of the lower court decisions to determine if the state court actually relied on the procedural bar as an independent basis for its disposition of the case. However, once the basis of the state ruling is established, the inquiry is at an end: "if the state enforces its procedural rules and deems the claim forfeited, then federal review is barred; if the state excuses a default, then federal review is proper." *Fernandez*, 227 F.3d at 978.

C.

WHETHER AN APPLICATION FOR STATE POST-CONVICTION OR OTHER COLLATERAL REVIEW COMPLIES WITH STATE FILING RULES IS A QUESTION OF STATE LAW THAT SHOULD BE DECIDED BY REFERENCE TO THE DECISIONS OF STATE COURTS.

AEDPA only permits tolling of applications that are "properly filed." As this Court has explained, "an application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings," including "the form of the document, the time limits upon its delivery, the court and

office in which it must be lodged, and the requisite filing fee." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). Obviously, these applicable rules are fixed by state, not federal, law, and like other kinds of procedural bars triggered by failure to comply with state procedural rules, protect the state interest in enforcement of state procedures. When an application fails to comply with these state procedural rules, including time limits, it is not "properly filed." *Pace*, 125 S.Ct. at 1812 ("When a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)") (quoting *Saffold*, 536 U.S. at 226).

The framework established in *Harris* and its progeny to determine generally when a federal court must decline review of a decision supported by an independent and adequate state ground applies with equal force to the question whether an application for state post-conviction relief is "properly filed." *See Pratt v. Greiner*, 306 F.3d 1190, 1196 (2d Cir. 2002) (deferential approach to whether state-court filing is "properly filed" echoes "the notions of federalism and comity that pervade our federal habeas jurisprudence"). After all, compliance with state procedural filing requirements, no less than compliance with other state procedural rules such as contemporaneous objection requirements or rules stipulating that to preserve a claim for collateral review, the claim must be raised on appeal, is mandatory to avoid procedural default. *See Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) (finding "no principled reason to apply a lesser measure of deference to the state court in the context of § 2244(d)(2) than we apply in the context of procedural default questions"). As Judge Easterbrook explained, "a decision with respect to proper filing, as a state-law procedural ground, should be treated the way

Harris specifies for other state grounds." *Brooks v. Walls*, 279 F.3d 518, 522 (7th Cir. 2002).

A rule requiring courts to defer to actual state court adjudications of compliance with filing requirements, like the *Harris* doctrine in the context of procedural default, strikes the appropriate balance. *Harris* balances the federal interest in safeguarding federal rights and encouraging uniformity in federal law, *Long*, 463 U.S. at 1040, against the state interest in safeguarding state law and procedural rules. It does this by directing federal courts to carefully examine the basis of state decisions and to decline jurisdiction if, but only if, the state court's decision plainly rested on an independent and adequate state ground. Applied to the question at issue here – whether an application is "properly filed" – the object of the federal court's inquiry should be simply to determine whether the state court actually based its ruling on a finding that the application was out of compliance with the rules governing proper filing.

Because state courts are the final authority on state law, federal courts must look to, and accept, a state court's interpretation of its statutes and its rules of practice. State court rulings regarding whether an application is properly filed should be, as this Court has treated them, dispositive with respect to whether an application is "properly filed." *See, e.g., Pace*, 125 S. Ct. at 1814 ("Because the state court rejected petitioner's PCRA petition as untimely, it was not 'properly filed,'); *Saffold*, 536 U.S. at 226 ("If the California Supreme Court had clearly ruled that Saffold's 4 ½-month delay was 'unreasonable,' that would be the end of the matter").

The federal circuit courts overwhelmingly have recognized that state rulings on such questions as the timeliness of an application are binding on federal courts. *See, e.g., Pratt v. Greiner*, 306 F.3d 1190, 1195 (2d Cir. 2002) (finding it well-settled "that courts, on habeas review, should not scrutinize the legitimacy of state court filings to determine whether they were 'properly filed' within the meaning of § 2244(d)(2)"); *Emerson v. Johnson*, 243 F.3d 931 (5th Cir. 2001) (federal courts defer to state courts' application of state law when determining whether something is 'properly filed'); *Israfil v. Russell*, 276 F.3d 768, 771-72 (6th Cir. 2001) ("Principles of comity require federal courts to defer to a state's judgment on issues of state law and, more particularly, on issues of state procedural law"); *Vroman v. Brigano*, 346 F.3d 598, 604 (6th Cir.2003) (holding that federal courts are obliged to accept state interpretation of law in response to claim that state court was incorrect); *Powell v. Davis*, 415 F.3d 722, 726 (7th Cir. 2005) ("we have no authority to second-guess a ruling based on state law"); *Habteselassie v. Novak*, 209 F.3d 1208, 1213 (10th Cir. 2000) (holding that because "the state court treated Habteselassie's motion as a motion for post-conviction relief" it would "find that his state motion was an 'application for State post-conviction or other collateral review' within the meaning of § 2244(d)(2)"); *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) (holding that "a federal court should defer to a state court's application of state filing deadlines").

Moreover, since questions regarding whether an application is "properly filed" are not limited to issues of timeliness, the approach proposed by the State – that federal courts should independently assess whether state filings comply with state procedural requirements – would embroil federal district courts in litigation

regarding a vast range of minutiae. *See, e.g., Hurley v. Moore*, 233 F.3d 1295 (11th Cir. 2000) (application not "properly filed" where state court ruled petitioner failed to comply with procedural requirement of written oath); *Sibley v. Culliver*, 377 F.3d 1196 (11th Cir. 2004) (application not properly filed where state court ruled, *inter alia*, petition was filed in wrong court and violated state law form requirements); *Christian v. Baskerville*, 232 F.Supp. 2d (E.D.N.Y. 2001) (petition not properly filed where state court determined petition failed to list specific errors alleged, as required under state rule). Under Petitioner's view, federal district courts would regularly be required to resolve issues not expressly resolved by state courts regarding whether the state prisoner paid the proper filing fee, conformed to applicable page or word limits, or typeset his papers within the correct margins. *Cf. Bennett*, 531 U.S. at 8 (noting that timeliness is only one of many standard attributes of a "properly filed" application). To resolve such issues, federal district courts will presumably be required to conduct evidentiary hearings, which in a case like this one, as Petitioner concedes, may involve fairly complex facts, in order to resolve the merits of a challenge to the propriety of state court filings. *See* Pet. Br. at 22 (determining whether a petition is untimely under California law is "a fact-intensive inquiry"). State rather than federal courts are much better positioned to make such factual determinations.

II.

APPLYING THESE PRINCIPLES, THE NINTH CIRCUIT PROPERLY DEEMED MR. CHAVIS'S APPLICATION "PROPERLY FILED" AND SUFFICIENT, UNDER *SAFFOLD*, TO TOLL THE STATUTE OF LIMITATIONS.

The State of California misreads this Court's decision in *Saffold*, and is mistaken regarding the proper role of federal courts in determining whether an application for state post-conviction relief has been "properly filed." A careful consideration of *Saffold*, viewed in light of the larger backdrop of procedural default jurisprudence, makes clear that the appropriate inquiry to be undertaken by a federal habeas court is not whether the federal court believes that Mr. Chavis's petition was untimely, but whether Mr. Chavis's application was ruled untimely by the California Supreme Court. *Cf. Harris*, 489 U.S. at 261 ("the mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim;" state court "must actually have relied on the procedural bar" in its disposition of the case).

A.

SAFFOLD DOES NOT SUPPORT THE STATE'S POSITION IN THIS CASE.

The *Saffold* case required this Court to determine whether, under California's unusual "original writ" system, an application for habeas review remains "pending" for purposes of § 2244(d)(2) during the period after a lower California court denied the petition, but before a new "original petition" was filed in a higher appellate court. Based on its conclusion that California's original writ system functions, in effect, like the "appeal" systems of other states, this Court held that an

application for collateral review remains pending under California's system through termination of the review process as long as the petitioner complies with applicable filing requirements, including the "due diligence" standard set forth under California law. 536 U.S. at 221-224.

Saffold filed his petition in the Calfornia Supreme Court 4 ½ months after the lower appeals court issued its decision. In denying the petition, the California Supreme Court explained that the denial was "'on the merits and for lack of diligence.'" 536 U.S. at 225. Foreshadowing its decision in *Pace*, this Court noted that if Saffold had not timely filed his petition in the California Supreme Court, then the period preceding filing of that petition would not be tolled. *Id.* at 226. In vacating the decision below, this Court rejected the Ninth Circuit's contention that the California Supreme Court's statement that it had denied Saffold's petition "on the merits" proved that it did not also find the petition untimely. Rather, this Court concluded that the state court decision may merely have reflected "alternative grounds for decision." *Id.* at 225. This Court then remanded back to the Court of Appeals.

Petitioner now contends that the purpose of this remand was to determine, in the first instance, whether Saffold's 4 ½ month delay was "unreasonable" under California state law. *See* Pet. Br. at 16. That is incorrect. This Court remanded to the Ninth Circuit to determine whether the California Supreme Court's denial of Saffold's petition "for lack of diligence" meant that the California Supreme Court had ruled specifically this his petition was untimely, or that he had overly delayed in initiating collateral review (which would not be relevant to whether the instant petition was timely). Because of

the ambiguity of the phrase "lack of diligence," *see id.* at 226 ("We cannot say in this case ... that the Ninth Circuit was wrong in its ultimate conclusion" that Saffold's petition was not dismissed as untimely); *id.* at 236 (Kennedy, J., dissenting) (noting that majority concluded "that the lack of diligence finding is ambiguous"), remand was necessary to determine the basis of the California Supreme Court's ruling. After all, "[i]f the California Supreme Court had clearly ruled that Saffold's 4 ½ month delay was 'unreasonable,' that would be the end of the matter." *Id.* at 226; *see also id.* at 236 (Kennedy, J., dissenting) ("If the California court held that all of respondent's state habeas petitions were years overdue, then they were not 'properly filed' at all, and there would be no tolling of the federal limitations period."); *Brooks v. Walls*, 301 F.3d at 842-843 (Easterbrook, J.) (explaining that purpose of remand in *Saffold* was to permit federal court to determine if phrase "'lack of diligence' differs linguistically from 'unreasonable delay,'" the California Supreme Court's "canonical phrase" for "untimely"). This is precisely what the Ninth Circuit understood its task to be on remand. *See Saffold v. Carey*, 312 F.3d 1031, 1034 (9th Cir. 2002) (O'Scannlain, J.).

Saffold is thus best understood as a variation of the basic "actual basis" approach routinely employed in federal habeas law. If the California Supreme Court actually dismissed Saffold's petition as untimely, then its determination establishes for purposes of § 2244(d)(2) that it was not "properly filed" – an independent and adequate state ground of decision. If it did not make that determination, however, then the federal court would have been wrong to so treat it. Petitioner's alternative reading of *Saffold*, which suggests the federal court should make its own determination of whether an

application complies with state timeliness requirements, would "create substantial uncertainty, and resulting federal litigation, over whether a prisoner had filed his habeas petition within a reasonable time." *Saffold*, 536 U.S. at 235 (Kennedy, J., dissenting) (noting difficulty of interpreting questions of timeliness where California law looks to whether prisoner exercised "due diligence" in filing petition).

Indeed, relying on *Harris's* "actual basis" principle to decide whether an application is "properly filed" helps resolve many of the conundrums encountered interpreting § 2244(d)(2). If an application has been conceded to be untimely by a petitioner, or adjudicated by a state court as untimely, or otherwise improperly filed, that application has not been "properly filed." *See Pace*, 125 S.Ct. at 1814. If a state court subsequently grants leave to file the untimely application, the petition is "properly filed" as of the date leave is granted. *See Fernandez*, 227 F.3d at 979 (state court's grant of motion for leave to file late petition renders petition "properly filed" for purposes of § 2244(d)(2)), *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001). The time period during which the application was adjudicated "out of time" by the state court, however, may not toll AEDPA's limitations period if no properly filed application was in fact pending. *See Fernandez*, 227 F.3d at 980; *Melancon*, 259 F.3d at 407.[2] Whether an untimely petition denied on

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2. The subsequent acceptance of an application by a court for consideration of the merits, or to consider whether an exception to the general time limit applies, establishes only that an application might be deemed "properly filed" as of its date a state court accepts it as filed, but does not retroactively moot the fact of its

the merits notwithstanding its untimeliness was properly filed turns on the basis of the state court's denial. If the petition ultimately is denied, solely or alternatively for noncompliance with filing requirements, it was never "properly filed." *See Saffold*, 536 U.S. at 226. At the same time, if the state court grounds its denial of an adjudicated untimely application solely on the merits, or otherwise does not indicate the denial was based on the acknowledged filing defect, the application was properly filed and tolls AEDPA's statute of limitations at least from the date of its belated acceptance to the date of denial. The actual basis rule also suggests that if a state court decides an arguably untimely application on the merits without ever indicating that the application was untimely or otherwise improper, such an application must be treated as "properly filed" and the full period tolled. *Id.* at 226 (implying that if California Supreme Court did not rule Saffold's petition untimely, then it was pending throughout 4 ½ month interval).

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impropriety prior to correction or waiver of the defect. A state court ruling that the application was not untimely due to the applicability of an exception, however, should mean that such application was both properly filed and pending throughout the relevant time period.

B.

BECAUSE *SAFFOLD* DIRECTS THE FEDERAL COURT TO DETERMINE WHETHER AN APPLICATION IS "PROPERLY FILED" BY LOOKING AT WHETHER IT WAS DEEMED OUT OF COMPLIANCE WITH STATE FILING RULES, MR. CHAVIS'S APPLICATION FOR COLLATERAL REVIEW MUST BE TREATED AS PROPERLY FILED.

Unlike in Saffold's case, the California Supreme Court gave no indication that Mr. Chavis's petition was untimely when it issued its summary denial. Since the California Supreme Court's summary denial was not issued in response to a motion to dismiss based on its lack of timeliness, and no lower court had ever deemed Mr. Chavis's application untimely, neither *Coleman*'s direction to examine the surrounding context of an ambiguous order, nor *Ylst*'s "look-through" principle supports the State's contention that the federal court can disregard altogether a California Supreme Court order that expressly did not make any finding of untimeliness. This Court's procedural default jurisprudence dictates the opposite. *See Jefferson v. Welborn*, 222 F.3d 286, 288 (7th Cir. 2000) (applying *Harris's* analytical framework to conclude that "if the last word from the state supreme court does not reveal whether a procedural bar or a substantive lack of merit motivated its ruling, we will presume it is the latter for purposes of § 2244(d), unless 'the last reasoned opinion on the claim explicitly impose[d] a procedural default,' which the denial of review by the state supreme court does not disturb") (quoting *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991)). Absent any indication that the California Supreme Court considered Chavis's petition untimely, an independent federal inquiry into whether Chavis's petition *could* have been ruled untimely, and hence improperly filed under California law, would exceed the proper bounds of the

federal court's habeas review powers and embroil federal courts in unwanted and unneeded federal litigation over matters that are more properly and efficiently resolved by state courts.

The State's position here carries with it significant consequences; investing federal courts with responsibility for interpreting and applying state procedural rules will likely only confuse state law. Will state courts be bound to follow federal interpretations of state timeliness requirements? If not, to which set of rulings should state prisoners look to for guidance, the states' own interpretations of state rules, or federal interpretations of state rules? Moreover, if federal courts have the authority to make independent determinations of whether state prisoners complied with state filing rules when the state courts did not make any such determinations, they would necessarily also seem to have the authority to disregard the procedural determinations in fact made by state courts when the federal court concluded that such rulings were incorrect. This latter conclusion, however, has been emphatically rejected by this Court in its recent cases. *See Pace*, 125 S. Ct. at 1812; *Saffold*, 536 U.S. at 226. The State's contention in this case should receive an equally emphatic rejection.

C.

MOST FEDERAL CIRCUIT COURTS REJECT PETITIONER'S ASSERTION THAT FEDERAL COURTS SHOULD INDEPENDENTLY ASSESS WHETHER AN APPLICATION COMPLIED WITH STATE FILING RULES.

The State suggests that the Ninth Circuit's decision below conflicts with decisions in several other circuit courts. *See* Pet.'s Br. at 39-43. That suggestion is incorrect. Most of the decisions cited by the State do not take issue

with the basic proposition at issue in this case, that federal courts should defer to state court determinations regarding the procedural propriety of a state prisoner's filings, including whether an application was timely filed. For example, in *Gibson v. Klinger*, 232 F.3d 799 (10th Cir. 2000), there was no dispute as to the timeliness of Klinger's appeal; Klinger expressly conceded that his petition was out of time, and filed a motion for leave to appeal out of time. The issue in *Klinger* was whether the time period during which Klinger's appeal had concededly lapsed, and the time that the appellate court granted his motion for leave to appeal out of time, was subject to tolling. The Tenth Circuit concluded it was not, because no "properly filed" application was pending during that time period.

Melancon v. Kaylo, 259 F.3d 401 (5th Cir. 2001), is equally inapposite. In that case, Melancon filed an application for supervisory writ "approximately five months" after the application was due, under Louisiana Court of Appeals Rule 4-3. *Id.* at 403. Although the Court of Appeal made an express finding that Melancon's appeal was untimely, it nonetheless considered the application on the merits pursuant to a provision in Rule 4-3 that allows the Court "to consider an application that was not timely filed if there is a 'showing that the delay was not due to the applicant's fault.'" *Id.* at 405. Noting its obligation to defer to state courts' application of state law in determining whether an application is "properly filed," the Fifth Circuit concluded that the untimely filed application was nonetheless "properly filed" for purposes of AEDPA. At the same time, because the Court of Appeal had expressly ruled that the application was untimely, the Fifth Circuit held that the application was not "pending" during the five months in which it

had been adjudicated out of time. Both *Melancon* and *Klinger*, therefore, are consistent with the proposition that the state determination of timeliness – not an independent federal determination – controls.

The State also claims that *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000), supports its view that federal courts should make independent assessments of a petitioner's procedural compliance with state law. It does not. As in *Klinger*, the petitioner Fernandez missed a filing deadline and, conceding that his petition was untimely, filed a motion for permission to file a late petition for leave to appeal. The Illinois Supreme Court permitted Fernandez to file his petition for leave to appeal, but did not grant him leave to file the petition itself. In concluding that Fernandez's petition was "properly filed," not only did the Seventh Circuit not condone an independent inquiry into his compliance with state filing rules, it held just the opposite: "if a state court accepts and entertains [a petition] on the merits it has been 'properly filed' but ... if the state court rejects it as procedurally irregular it has not been 'properly filed.' The Court also recognized the corollary proposition, reflecting the application of the general principles of procedural bar set forth in *Harris v. Reed*, "that a petition that fails to comply with state procedural requirements is still 'properly filed' if the state accepts it and issues a decision on the merits." *Id.* at 978.[3]

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3. In light of *Saffold*, this corollary proposition is probably correct only if the state decision could not be interpreted as resting, at least as an alternative ground, on the filing defect.

Only one Circuit Court – the Fourth – appears to have adopted the rule the State urges this Court to adopt here, and a review of that decision illustrates its deficiencies. In *Allen v. Mitchell*, 276 F.3d 183 (4th Cir. 2001), the court was called on to determine whether a petition for certiorari, filed four years after denial of his initial petition for collateral relief, was "properly filed" where the North Carolina Supreme Court denied the petition without explanation. Like California, North Carolina imposes no determinate timing limit to seek review, merely requiring that the petition be filed "without unreasonable delay." 276 F.3d. at 186 (citing N.C. R.App. P. 21(c)).

Under North Carolina law, whether delay is unreasonable turns on whether the petition would be "subject to dismissal under the equitable doctrine of laches." *Id.* at 186. It is not based upon mere passage of time, and to resolve the dispute, a court must take into account whether "the delay is (i) unreasonable and (ii) injurious or prejudicial to the party asserting the defense." *Id.* at 187. In the face of this complex factual question, the Fourth Circuit concluded that it could not determine, one way or the other, if "Allen's petition was necessarily untimely solely because it was filed more than four years after the denial of his" initial motion for relief. *Id.* Accordingly, the Fourth Circuit ruled that "Allen must be afforded an opportunity to explain the lengthy delay," and thus remanded the case to the federal district court for further proceedings, and an evidentiary hearing if necessary, to determine whether the certiorari petition was timely.[4] *Id.*

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4. Even if the Court concluded as a result of that hearing that Allen's petition was untimely, it still was

It is precisely to avoid these types of fact-intensive inquiries into state procedural rules that the well-developed principles of procedural default require federal courts to limit their inquiry to the actual basis of the state court's decision. It is also why most courts faced with the problem of determining whether an application is timely or otherwise "properly filed" have almost uniformly limited their inquiry to the actual grounds of decision relied upon by state courts. The same deference is required here.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

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confronted with the additional problem of determining precisely "when the Appeal Period ended and how much time subsequently accrued against the statute of limitations." 276 F.3d. at 187. Given the indeterminate nature of North Carolina's timeliness rules, it is not clear how a federal court should resolve that question.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

MIKE EVANS, Warden, *Petitioner,*

v.

REGINALD CHAVIS, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE UNITED STATES

No. 04-721

MIKE EVANS, Warden, *Petitioner,*

v.

REGINALD CHAVIS, *Respondent.*

Respondent Chavis acknowledges that *Carey v. Saffold* allows tolling of the AEDPA limitations period for the interval after denial of state collateral relief by a lower court and a filing in a higher court only "*as long as* the latter petition was timely filed" under state law. Resp. Br. 20; *see Carey v. Saffold*, 536 U.S. 214, 223, 225 (2002). He also agrees that the Ninth Circuit resolved the issue of statutory tolling for the three-year period of delay in this case by simply applying a conclusive presumption that enabled it to find that, contrary to all appearances, his November 1997 petition was timely. And he does not dispute the fact that in California the state usually will not have had the opportunity to raise, and the state courts often will not have reached, the question of timeliness before a summary denial like the one in this case issues.

Chavis nevertheless maintains that the solution for the many cases in which there is no indication from the state court whether the petition was timely filed is, as the Ninth Circuit says, for federal courts considering statutory tolling to presume that a state court petition for habeas corpus was timely and pending during the entire interval before its filing. Resp. Br. 14. Chavis does not argue that this presumption would be accurate most of the time — or even in his own case — but nevertheless

urges that it would just be too difficult for federal courts to apply California law and determine the timeliness of state habeas petitions. Chavis also claims that the Ninth Circuit's presumption would better serve the principles of comity and federalism. Resp. Br. 26-33. These arguments do not withstand scrutiny.

I.

THE NINTH CIRCUIT'S PRESUMPTION DOES NOT REFLECT ACTUAL PRACTICE OR ACHIEVE THE CORRECT RESULT IN MOST CASES AND HAS NO SUPPORT IN STATE OR FEDERAL LAW

Judicially-created *per se* rules and conclusive presumptions have a place in our jurisprudence. Conclusive presumptions are crafted "to avoid the costs of excessive inquiry where a *per se* rule will achieve the correct result in almost all cases." *Coleman v. Thompson*, 501 U.S. 722, 737 (1991). In federal habeas corpus, as in other contexts, "[*p*]*er se* rules . . . require the Court to make broad generalizations. . . . Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them." *Id.* (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977)); *see also Rakas v. Illinois*, 439 U.S. 128, 147 (1978).

What Chavis fails to understand is that "[*p*]*er se* rules should not be applied . . . in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Coleman*, 501 U.S. at 737. Thus, this Court has declined to extend or create presumptions where, as here, the predicate fact or circumstance does not usually compel the particular conclusion. *See, e.g., Spencer v. Kemna*, 523 U.S. 1, 12 (1998); *Coleman*, 501 U.S. at 740; *Rakas*, 439 U.S. at 140, 147-48.

Before instituting a presumption or *per se* rule, courts must determine that presuming a particular conclusion from a certain predicate fact without a case-by-case analysis "comport[s] with reality." *Spencer*, 523 U.S. at 12. Chavis posits several arguments in favor of the Ninth Circuit's broad presumption of timeliness, but notably absent is any suggestion that the presumption he embraces "will achieve the correct result in almost all cases." *Coleman*, 501 U.S. at 737. As discussed in the Warden's opening brief, it will not. Pet. Br. 32-36. The Ninth Circuit's presumption therefore possesses only a "superficial clarity." *Rakas*, 439 U.S. at 147.

A. The Warden's Proposed Sixty-Day Presumption Would Achieve The Correct Result In Most Cases

The Warden, on the other hand, proposes a more tailored presumption that will eliminate a case-by-case inquiry in those cases with the appropriate factual predicate. Where the state petition has been filed within sixty days of denial by the lower court, it may be presumed timely. Pet. Br. 47. Unlike the Ninth Circuit's overbroad presumption, this reflects the reality of California practice.

The issue of interval tolling necessarily arises only in the context of a second or third petition filed in an appellate court after denial in a lower court. There is never statutory tolling for the period of time preceding the filing of the first state petition; that first petition initiates the "one complete round" of state collateral review. *See Saffold*, 536 U.S. at 220 (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)). Generally, the federal courts must only decide whether the prisoner is entitled to statutory tolling for the interval following the denial of an initial petition and preceding the filing of a petition in an appellate court. The appellate court petition should usually raise the same claims as the previous petition, *see Saffold*, 536 U.S. at 221-22; *In re Ramirez*, 108 Cal. Rptr. 2d 229, 232 (Cal. Ct. App. 2001); *People v. Djekich*, 280 Cal. Rptr. 824, 827 (Cal. Ct. App. 1991), a matter that requires only filling out a new

form petition with the same grounds for relief and the same supporting facts.[1] This Court views this as "basic appellate review." *Saffold*, 536 U.S. at 222.

In California, defendants have sixty days to file a notice of direct appeal from a superior court judgment. Cal. Rules of Court, rule 30.1(a). The purpose of vesting original habeas jurisdiction in all levels of California courts is to permit one who is wrongfully imprisoned to obtain release as quickly as possible without the delays inherent in the normal appellate process. *Ex parte Zany*, 130 P. 710, 711 (Cal. 1913); *In re Mazoros*, 142 Cal. Rptr. 609, 612 (Cal. Ct. App. 1977); *Ex parte White*, 84 P. 242, 244 (Cal. Ct. App. 1906). Therefore, it is best to presume that a petition that was summarily denied without explanation was timely filed if it was filed within sixty days of denial by the court below. This presumption will ease the federal courts' burden, respect California law, and lead to the correct result in most cases.

B. The Ninth Circuit's Presumption Is Not Supported By This Court's Decisions

a. *Carey v. Saffold*. To be sure, *Saffold* did not specifically hold that a federal habeas court must independently determine, for purposes of applying the AEDPA statute of limitations, whether a state habeas petition denied by a state appellate court with an unexplained summary order was timely. The logic and reasoning of the decision, however, make it crystal clear that the Court intended that result. *See* Pet. Br. 15-19. The Court in *Saffold* specifically expressed the concern that the Ninth Circuit's approach "risks the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts." 536

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1. This Court has recognized that it should not take long to re-file claims in a different court. *Rhines v. Weber*, 125 S. Ct. 1528; 1535 (2005) (approving of a requirement that petitioners present unexhausted claims to their state court within thirty days of the federal court granting a stay).

U.S. at 226. As an example, the Court cited to *Welch v. Newland*, 267 F.3d 1013 (9th Cir. 2001) (finding limitations period tolled during four-year gap). *Welch*, like the present case, involved an unexplained summary denial. It would be passing strange for the Court, having used *Welch* as the prototypical example of a state habeas petition that was not "pending" during the entire interval prior to its filing, to have intended to adopt a rule that all summarily-denied state habeas applications will be deemed timely for AEDPA purposes. To the contrary, doing so would, in *Saffold*'s words, "threaten[] to undermine the statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." *Saffold*, 536 U.S. at 226.

For this reason, it is not surprising that the four dissenters in *Saffold* read the opinion as the Warden does. The dissent recognized that "the California courts routinely deny petitions filed after lengthy delays without making specific findings of undue delay" and expressed the understanding that, under the Court's holding, federal courts would be deciding whether the petitioners in those cases acted with due diligence. 536 U.S. at 235 (Kennedy, J., dissenting) (internal citation omitted). Nothing in the Court's opinion suggested that the dissent construed the opinion incorrectly in that regard.

b. *Harris v. Reed*. Both Chavis and amicus curiae, the National Association of Criminal Defense Lawyers (NACDL), place great emphasis on this Court's decision in *Harris v. Reed*, 489 U.S. 255 (1989). In that decision, the Court held that the "plain statement" rule of *Michigan v. Long*, 463 U.S. 1032 (1983), applies to cases on federal habeas review. Accordingly, "if it fairly appears that the state court rested its decision primarily on federal law," "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar." *Harris*, 489 U.S. at 261, 263 (internal quotation marks and citations omitted). According to Chavis

and amicus, an analogous rule should apply here, *i.e.*, a state habeas petition should be deemed timely unless the state court expressly indicates it was untimely. *See* Resp. Br. 29-30, 34-35; NACDL Br. 7-12. That argument fundamentally misconstrues the underpinnings of *Long* and *Harris* and the role of federal courts when applying the AEDPA limitations period.

The Court explained in *Long* that the "adequate and independent state ground" doctrine "is based, in part, on the limitations of our own jurisdiction" and the concern that the Court "not render an advisory opinion." 463 U.S. at 1042 (internal quotation marks and citations omitted). The Court applies the doctrine in habeas cases because,

> [w]ithout the rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its own laws.

Coleman, 501 U.S. at 730-31. The concern about this Court's jurisdiction and its rendering of advisory opinions (and of end runs around those limits) does not arise if the state court did not decide the case on state-law grounds, even if the state court *could have* done so. Thus, the *Long* plain statement rule helps answer the question whether the state court, in fact, relied on an adequate and independent state ground for its decision. The very purpose of the *Long* rule is to determine whether a state court issued a ruling under state (as opposed to federal) law. Its entire focus is necessarily on what the state court did. The rule is not intended to affect — and has no effect on — a federal court's analysis of federal legal issues or a federal court's application of federal statutes.

Here, by contrast, the application of a federal provision is at issue. This federal provision, 28 U.S.C. § 2244(d)(2),

provides that a state application for post-conviction relief tolls the AEDPA limitations period only when it is "pending" in state court. The Court held in *Saffold* that whether an application is "pending" depends on whether it was timely filed with a state appellate court. Accordingly, the issue here, in contrast to the issue addressed in *Long* and *Harris*, is not what the state court did; it is what the habeas petitioner did: Did he file his state application to the appellate court in a timely fashion and therefore have a "pending" application?

Of course, a state court can definitively answer that question by ruling on an application's timeliness. The NACDL is simply wrong in asserting that the Warden's position is that federal courts can reassess the timeliness of a state application even after a state court has issued a holding on its timeliness. NACDL Br. 12-13, 21. To the contrary, the Warden has never disputed the obvious proposition that a state court's ruling on that issue of state law is dispositive. A state court's *silence*, however, does not indicate whether the application was "pending" within the meaning of 28 U.S.C. § 2244(d)(2). Section 2244(d)(2) does not provide that a state application tolls the limitations period when it is "pending *as expressly determined by the state court*"; it merely looks to whether the application was "pending." If the state court has not addressed the timeliness issue, the federal court must (where resolution of this issue would determine whether the federal petition was filed within the federal one-year limitations period).

The oddity of applying a *Harris*-like plain statement rule in this very different context can be seen most clearly in its application in a state that has a specific filing deadline. Let us assume that a state prisoner appeals the denial of post-conviction relief 250 days after the denial, even though a state rule requires the appeal to be filed within sixty days of the denial (with no exceptions). Then assume that the state appellate court summarily denies the application (a practice common in most states, not just California). According to Chavis and amicus, a federal court would have to treat the

appeal as timely and treat the application as "pending" during the entire 250-day period because the state court did not plainly address timeliness. There is no sound jurisprudential or policy reason for such a result.

c. *Pace v. DiGuglielmo* and *Gonzalez v. Crosby*. Chavis and amicus further argue that the Ninth Circuit's presumption is supported by the recent decisions in *Pace v. DiGuglielmo*, 125 S. Ct. 1807 (2005), and *Gonzalez v. Crosby*, 125 S. Ct. 2641 (2005). Resp. Br. 22-24; NACDL Br. 11-14. *Pace* and *Gonzalez* (in passing) dealt with the requirement that an application for state collateral review be "properly filed" to merit tolling while under consideration by the state court. *Pace*, 125 S. Ct. at 1810; *Gonzalez*, 125 S. Ct. at 2650 n.8. This Court held in *Pace* that, if the state trial court rejects a petition for post-conviction relief as untimely, it is not properly filed and cannot toll the AEDPA period of limitation. *Pace*, 125 S. Ct. at 1814. A footnote in *Gonzales* suggested that the Florida courts' failure to mention untimeliness in dismissing petitioner's post-conviction motions might make *Pace* inapplicable. *Gonzalez*, 125 S. Ct. at 2650 n.8. It follows, according to Chavis and amicus, that a state appellate court's failure to mention untimeliness also must be treated as a state-court finding that the application was timely and thus "pending" during the entire period prior to its filing. Chavis and amicus are once more mixing apples and oranges.

The "properly filed" and "pending" requirements are different in nature, leading to different presumptions arising from state court silence. The requirement in the AEDPA tolling provision that a state application be properly filed recognizes that all state courts have requirements that serve as filing conditions for all types of documents. These filing conditions "go to the very initiation of a petition and a court's ability to consider that petition." *Pace*, 125 S. Ct. at 1814. If the state court does not reject the document for noncompliance, it is

reasonable to conclude that it was properly filed with that court.[2/]

By contrast, as discussed above, state appellate court silence as to the reasons why it denied an application does not logically imply that the application was timely filed. Moreover, whereas all state courts have filing requirements, the concept that a state application for collateral relief can remain "pending" during the intervals between filings when nothing is actually before a court arises out of a construction of AEDPA's language and is a matter of federal habeas corpus law. *Gibson v. Klinger*, 232 F.3d 799, 806 (10th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 883 (8th Cir. 1999). Under AEDPA, a state court application remains "pending" between filings regardless of whether state law would treat it that way. *See Saffold*, 536 U.S. at 221-23. Indeed, California law specifically holds that a habeas corpus proceeding is *not* "'pending' at any time after judgment" by the state court. *Zany*, 130 P. at 711. Rather, in the context of AEDPA's tolling provision, applications are considered continuously pending throughout "one complete round" because one purpose of the AEDPA tolling provision is to allow prisoners to exhaust their state remedies before proceeding to federal court. *Saffold*, 536 U.S. at 219-20. Inclusion of a state's "appellate filing periods" — and "California's 'reasonableness' periods" — between timely filings furthers this purpose of the tolling provision. *Id.* at 222-23. Inclusion of long periods of inactivity do not. It is therefore not consistent with either federal *or* state law to deem an application pending during such intervals of inactivity. Were those periods included, it would threaten the equally important goal of the tolling provision to respect the finality of state court judgments. *See id.* at 222.

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2. The Warden does not suggest, as Chavis and amicus fear, that the federal courts determine for themselves whether a state application was properly filed. *See* Resp. Br. 32 n.11, 45 n.19; NACDL Br. 13-14, 21.

C. The Ninth Circuit's Presumption Improperly Requires The State Court To Anticipate And Decide A Federal Question

As the Warden's opening brief argued, the Ninth Circuit's presumption improperly dictates to the state courts how they should handle and decide state habeas cases. Pet. Br. 38; *see also* Pet. Br. 34-35. Chavis's response is that the Ninth Circuit's presumption "only require[s] the state courts to make an explicit determination of timeliness in those cases where the state court *wishes to foreclose statutory tolling under* [28 U.S.C.] *§ 2244(d)(2).*" Resp. Br. 29. There are several problems with this position.

First, Chavis ignores this Court's plain words:

> We can establish a *per se* rule that eases the burden of inquiry on the federal courts in those cases where there are few costs to doing so, but we have no power to tell state courts how they must write their opinions. We encourage state courts to express plainly, in every decision potentially subject to federal review, the grounds upon which their judgments rest, but we will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim—every state appeal, every denial of state collateral review—in order that federal courts might not be bothered with reviewing state law and the record in the case.

Coleman, 501 U.S. at 739.

Second, the state court, while concerned about the finality of convictions, does not have an overriding interest in making the precise finding that Chavis would have it make. State law does not require state appellate courts to decide whether a habeas application was timely filed if such a decision is not necessary to the resolution of the case. Furthermore, the California Supreme Court has explained that it does not impose procedural bars "merely as a means of promoting finality by

insulating our judgments from federal court review." *In re Robbins*, 959 P.2d 311, 316 n.1 (Cal. 1998). Rather, California's concern is broader: For "decades" the California Supreme Court has "recognized and imposed . . . procedural bars, including the untimeliness bar . . . to advance, among other institutional goals, the integrity of our appeal and habeas corpus process." *Id.* In many cases, California courts can advance these goals without making the precise timeliness finding that Chavis would impose on them. California appellate courts should not be required to elevate speculative concerns as to the application of the AEDPA tolling provision in a potential future federal habeas case above those other state concerns.

Chavis has it exactly backwards when he asserts that having federal habeas courts determine the timeliness of a state habeas application is an "intrusion" on the state courts. Resp. Br. 28. A federal court is not "second-guess[ing]," *id.*, a California appellate court when it reaches an issue that the state court had no reason to reach. As shown above, the state courts' decision not to explicitly address timeliness (or the merits or any of a dozen other possible procedural bars) is a pragmatic decision that cannot seriously be understood as expressing the desire that a future federal court not address those issues either.

Indeed, to the extent that second-guessing is a concern, the Ninth Circuit's rule is more problematic. As Chavis points out, freed from the statute of limitations issue, the federal court may consider whether the federal petition is subject to dismissal under Habeas Rule 4 for failure to make a prima facie case for relief on the merits. Resp. Br. 37. But the state appellate court may well have summarily denied the state application for precisely that failure. Chavis's assumption that the federal court will necessarily arrive at the same conclusion as the state court when the state court has found that no prima facie case has been presented, and that it will necessarily dismiss the petition under Rule 4 (Respondent. Br. 36-37), is unfounded. In practice, the federal court will be more hesitant to summarily dismiss the

petition because it usually will have less information than its state counterpart.[3]

II.

THE WARDEN'S APPROACH DOES NOT IMPOSE AN UNDUE BURDEN ON THE FEDERAL COURTS AND BEST SERVES THE OBJECTIVES OF AEDPA

A. California's Timeliness Standards For State Habeas Petitions Are Not "Extraordinarily Difficult" To Apply

In addition to minimizing the burden that the Ninth Circuit's rule would impose on the state courts, Chavis overstates its benefits to the federal courts and prisoners. Chavis insists that the application of California's timeliness standards is "extraordinarily difficult." Resp. Br. 39. That seriously underestimates the federal courts' abilities. The federal courts regularly confront difficult questions of the application of state law in the exercise of their diversity jurisdiction. *See, e.g., Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960) ("Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought"), *judgment set aside and remanded*, 365 U.S. 293 (1961). An application of settled California case

3. At the time of its preliminary assessment under Rule 4, the federal court has before it only the federal petition and any exhibits the prisoner attaches, unless the court has ordered a response from the custodian. The state courts, on the other hand, are in a better position to determine whether the prisoner states a prima facie case on the merits. They will be familiar with the trial (if it is the superior court) or will have the trial record from direct appeal available (if the appellate courts). *See In re Clark*, 855 P.2d 729, 761 n.35 (Cal. 1993).

law to the discrete question of tolling does not approach that level of complexity.

Moreover, the Warden's proposed limited presumption as a "partial solution," *Coleman*, 501 U.S. at 732, would reduce the federal courts' work. Under this partial solution, where the state petition has been filed within sixty days of denial by the lower court, it may be presumed timely. Pet. Br. 47. If the state petition was filed outside sixty days of denial, the federal court should consider whether the prisoner has nevertheless demonstrated due diligence in discovering and presenting the factual and legal bases for his claims. *Robbins*, 959 P.2d at 337; *Clark*, 855 P.2d at 785 n.21. This is done by looking at the prisoner's response to question 15 of the California Judicial Council form petition, which requires the petitioner to "[e]xplain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition."[4] J.A. 20.

The present case is fairly representative of the type of explanation that will be offered. As discussed in the Warden's opening brief, Chavis offered an explanation and exhibits to the state court that only purported to account for three months out of the three-*year* lull after the California Court of Appeal's denial. Pet. Br 47-49. It is no difficult matter to conclude that the November 1997 state petition was untimely.

To the extent that there may be harder cases, that cannot be enough of a reason for the federal courts to avoid this issue and permit tolling even though it is "highly likely that the prisoner failed to seek timely review in the state appellate courts." *Saffold*, 536 U.S. at 226. Even though it may be more challenging than the mechanical application of timeliness rules

4. Explanations offered to the federal court, but not the state court, should not be considered in deciding the timeliness of the state petition. Chavis's current claim (Resp. Br. 11, 41) that a "series of lockdowns" prevented him from having access to the law library from the time he received a job re-assignment in March 1996 (*see* J.A. 73-74), until he finally filed his California Supreme Court petition in November 1997 (*see* Pet. App. F) was not presented to the state court (*see* J.A. 20-31).

expressed in days, California's standard sets understandable parameters. Furthermore, examples of the federal courts deciding timeliness issues under indeterminate guidelines like California's habeas standards abound. *See, e.g., Kansas v. Colorado*, 514 U.S. 673, 687 (1995) (doctrine of laches); Rules Governing § 2254 Cases, Rule 9(a) (repealed 2004); Fed. R. Civ. P. 4(m); Fed. R. Civ. P. 60(b)(4)-(6); *see* Pet. Br. 44.

In fact, federal courts have extensive experience in applying indeterminate timeliness requirements in the federal habeas context. The AEDPA limitations period itself does not begin to run until "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence" if that is later than the date of finality of the judgment. 28 U.S.C. § 2244(d)(1)(D); *see also* § 2255, ¶ 4; *Johnson v. United States*, 125 S. Ct. 1571, 1582 (2005). This Court has suggested, as a number of circuits hold, that petitioners who fail to meet the requirements of the AEDPA limitations period may seek equitable tolling. *Pace*, 125 S. Ct. at 1814-15. That generally requires the federal court to decide whether the petitioner had been "pursuing his rights diligently" but "some extraordinary circumstance stood in his way." *Id.* at 1814. In addition, a prisoner who is concerned that he is in danger of violating the federal limitations period while exhausting state remedies may seek to file and then stay a federal petition, which requires the federal court to decide whether the prisoner has shown "good cause" for his failure to exhaust remedies within the allotted time and to prescribe "reasonable time limits" for the prisoner to return to state court. *Rhines*, 125 S. Ct. at 1535. These inquiries are almost identical to the inquiry required under California's timeliness standards.

Moreover, the federal court's task is easier than the California appellate court's task in this regard. If the *state* court decides that the petition before it was unreasonably delayed, it must then proceed to "read the petition to assure [itself] petitioner's factual allegations do not make a prima facie showing his case falls within one of the four exceptions to the

timeliness requirement set forth in *Clark*" before deciding whether to impose the procedural bar of untimeliness or decide the case on the merits.[5] *Sanders*, 981 P.2d at 1044; *see* Pet. Br. 22-23. The *federal* court, on the other hand, should decide only whether the state petition was timely, and not whether the state court would have or should have imposed a procedural bar. The federal court, unlike the state court, therefore need not apply the *Clark* exceptions.

The federal court's inquiry into state law would, in practice, be limited rather than burdensome. Generally, the claim will have been presented in a prior petition or else the petitioner will have asserted to the state appellate court that he only recently discovered the factual basis for the claim. If he asserted recent discovery of the facts, then the question for the federal court is no longer one of state law or even tolling, for AEDPA's limitations period does not even begin to run until the factual predicate could have been discovered with due diligence. 28 U.S.C. § 2244(d)(1)(D). The same is true if the petitioner claimed that he was impeded "by State action," 28 U.S.C. § 2244(d)(1)(B), or if he relied on a new rule of law made retroactive by this Court, 28 U.S.C. § 2244(d)(1)(C).

If, as is more common, the prisoner is presenting claims that were already known and raised in a prior petition, many of the usual justifications for delay simply will not apply. For example, the federal court need not delve into the question of whether the prisoner was conducting an ongoing investigation into a potentially meritorious claim, *see Robbins*, 959 P.2d at 318, because that question is generally relevant only to the timeliness of the prior petition in which the claim was first raised.

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5. These exceptions to the procedural bar of untimeliness are for a fundamental miscarriage of justice and have nothing to do with whether facts exist that somehow excuse the delay. *In re Sanders*, 981 P.2d 1038, 1054 n.14 (Cal. 1999); *see* Pet. Br. 22.

Finally, the NACDL needlessly complicates the issue by suggesting that a prisoner who files an untimely application with a state appellate court is entitled to tolling during the period when he *could have* filed a timely petition, thus forcing federal habeas courts to calculate when the time for filing the application ended. NACDL Br. 24 n.4. This misreads how the AEDPA tolling provision operates. Where a prisoner files an untimely application with a state appellate court, the AEDPA limitations period is not tolled during *any* of the period between the lower court denial of relief and the filing of the untimely application. This Court held in *Saffold* that a prisoner will receive statutory tolling for the intervals between denial of relief by a lower court and application to a higher court only if the prisoner complies with state timeliness requirements in proceeding from the lower court to the higher court. *Saffold*, 536 U.S. at 225; *see also id.* at 235 (Kennedy, J., dissenting) ("on the Court's holding only timely petitions cause an application to be (retroactively) pending"). Congress expressly provided that the limitations period does not begin to run until the expiration of the time for seeking direct review, 28 U.S.C. § 2244(d)(1)(A), but required a "properly filed" and "pending" petition to *toll* the limitations period. 28 U.S.C. § 2244(d)(2); *see Gutierrez v. Schomig*, 233 F.3d 490, 492 (7th Cir. 2000).

B. The Warden's Approach Reduces The Need For Protective Petitions Filed In Federal Court

Chavis raises the specter of increased numbers of protective petitions filed in federal court before state remedies have been exhausted. Resp. Br. 31-32. According to him, the "fear that any significant delay in filing [a state] petition may result in an independent determination of untimeliness *even if the California state court makes no such finding*" will lead prisoners to file protective petitions in federal court. Resp. Br. 33. But no matter how the Court decides this case, a prisoner will face uncertainty about tolling if his state application is not clearly timely. In *Pace*, this Court recognized that a prisoner

exhausting state remedies runs the risk that the state court will expressly rule that his petition was untimely, with the consequence that his state petition does not toll the limitations period even while under consideration. *Pace*, 125 S. Ct. at 1813. He cannot know whether the limitations period is tolled while he awaits the state court's ruling. This Court has already accepted the fact that "[a] petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' for him to file in federal court." *Id.* at 1813. Chavis does not explain how the Warden's position exacerbates this situation.

Actually, adoption of the Warden's proposed sixty-day presumption would minimize the incentive for California prisoners to file protective federal petitions as well as encourage the timely exhaustion of remedies in state court. A prisoner who proceeds to a higher appellate court within sixty days after denial by a lower court could then be confident that the federal court will not later deny tolling for the time he spent preparing his petition for a higher court.

C. The Ninth Circuit's Presumption Does Not Advance The Objectives Of AEDPA

Chavis supports the Ninth Circuit's presumption on the ground that the AEDPA limitations period is concerned only with "ensur[ing] that federal petitions are filed expeditiously *once state proceedings have finally been concluded*." Resp. Br. 25. The language of the statute does not support this conclusion. If that had been Congress's only concern, the statute would have been drafted so that the limitations period ran from the conclusion of state collateral proceedings. *See Burger v. Scott*, 317 F.3d 1133, 1138 (10th Cir. 2003). Instead, it begins to run (in most cases) upon the conclusion of direct review and is tolled only while "properly filed" state applications are "pending." 28 U.S.C. § 2244(d)(2).

Furthermore, this Court has long been concerned with the passage of time from *conviction* to resoluti on of federal habeas

proceedings. *See Engle v. Isaac*, 456 U.S. 107, 127-28 (1982) (noting the difficulty of re-trying prisoners after the "[p]assage of time, erosion of memory, and dispersion of witnesses"); *see also McCleskey v. Zant*, 499 U.S. 467, 490-91 (1991); *Kuhlmann v. Wilson*, 477 U.S. 436, 452-53 (1986). Likewise, one of Congress's goals in enacting AEDPA was to reduce the abuse of the habeas corpus process resulting from delay by incorporating a new period of limitation that would preserve the availability of federal review only for prisoners who "diligently pursue[] state remedies." H.R. Rep. No. 104-23, at 29 (1995), 1995 WL 56412 at *9. AEDPA now "'reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan v. Walker*, 533 U.S. 167, 179 (2001).

For this reason, federal courts have rejected arguments like Chavis's and enforce AEDPA's one-year limitations period even though the state may have a longer statute of limitations for the filing of an initial state post-conviction motion. *See Ferguson v. Palmateer*, 321 F.3d 820, 822-23 (9th Cir. 2003); *Tinker v. Moore*, 255 F.3d 1331, 1334-35 (11th Cir. 2001); *Painter v. Iowa*, 247 F.3d 1255, 1256 (8th Cir. 2001). "It is unreasonable for a federal habeas petitioner to rely on a state statute of limitations rather than the AEDPA's statute of limitations." *Ferguson*, 321 F.3d at 823. A prisoner is free to use whatever time the state court may afford him, but "[i]f . . . he also seeks federal relief, he must conform his petition to the federal rules." *Id.* "[A]s a federal statute that interacts with state procedural rules, § 2244(d) will sometimes force a state prisoner to act expeditiously to preserve his federal claims despite the procedural lenience of state law, which may forgive substantial delay." *Burger*, 317 F.3d at 1138. Here, too, a prisoner may file habeas petitions in California state courts at his leisure and gamble that the state courts will not impose a procedural bar, but if he plans to seek federal relief, he must be

mindful that he will not receive indefinite tolling of the AEDPA statute of limitations.

Chavis also complains that it is not fair for prisoners to have to prove the timeliness of their state petitions twice, once before the California courts, and again before the federal court. Resp. Br. 31. But this is a necessary consequence of the opportunity to seek relief in two systems. California requires that prisoners assume the burden of establishing the timeliness of their state habeas petitions. *Robbins*, 959 P.2d at 317, 322, 327 n.16; *Clark*, 855 P.2d at 738, 750-51, 753, 761 n.35. If the prisoner then proceeds to federal court and the record shows that his federal petition was filed outside the one-year limitations period, the petitioner bears the burden of demonstrating that the AEDPA limitation period was sufficiently tolled. In any event, if there was delay in seeking state habeas relief, the prisoner need only direct the federal court to the explanation he offered the state court.

Lastly, Chavis argues that there is a danger that truly meritorious cases will be dismissed pursuant to the AEDPA limitations period if the federal court ensures that the tolling provision is properly applied. Resp. Br. 38, 46. It is, of course, inherent in the nature of a statute of limitations that "a substantive claim will be barred without respect to whether it is meritorious." *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). Moreover, it is far from clear that prisoners with meritorious claims will be better off under the Ninth Circuit's presumption. The Ninth Circuit's presumption permits prisoners to be dilatory and encourages them to gamble that the state appellate court will not issue an untimeliness finding due to the large volume of cases that it must decide. The arguably meritorious cases are, however, the very cases in which the state court is most likely to find a prima facie case and issue an order to show cause instead of a summary order. The Attorney General will then respond and raise the issue of timeliness, possibly resulting in an express finding of untimeliness. The prisoner will proceed to federal court to find that he not only is

denied the benefit of tolling for the interval preceding that petition, but also that the petition itself did not toll the limitations period while under consideration.

In the end, the solution to the problem presented by this case must be "compatible with AEDPA's purposes." *Rhines*, 125 S. Ct. at 1534. It is beyond dispute that the limitations period "'quite plainly serves the well-recognized interest in the finality of state court judgments.'" *Id.* (quoting *Duncan*, 533 U.S. at 179).

In this case, the Ninth Circuit has instituted a rule that "threatens to undermine the statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." *Saffold*, 536 U.S. at 226. It does so by pretending that unexplained summary orders issued after a California appellate court's preliminary assessment are in fact decisions that the state petition was timely. This threatens the careful balance struck in the AEDPA limitations period and tolling provision as well as the uniformity of the application of the federal statute. When one "ask[s] whether [Chavis] delayed 'unreasonably' in seeking California Supreme Court review," *Saffold*, 536 U.S. at 225, the answer can only be "yes."

CONCLUSION

For the foregoing reasons and those stated in the Warden's opening brief, it is respectfully submitted that the judgment of the Ninth Circuit should be reversed.

Dated: October 20, 2005

Respectfully submitted,

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

EVANS, ACTING WARDEN *v.* CHAVIS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04–721. Argued November 9, 2005—Decided January 10, 2006

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) gives a state prisoner whose conviction has become final one year to seek federal habeas corpus relief, 28 U. S. C. §2244(d)(1)(A), but tolls this 1-year limitations period for the "time during which a properly filed application for State . . . collateral review . . . is pending," §2244(d)(2). Under California's collateral review scheme, the equivalent of a notice of appeal is timely if filed within a "reasonable time." In *Carey* v. *Saffold*, 536 U. S. 214, this Court held, *inter alia*, that (1) only a *timely* appeal tolls AEDPA's limitations period for the time between the lower court's adverse decision and the filing of a notice of appeal; (2) in California, "unreasonable" delays are not timely; and (most pertinently) (3) a California Supreme Court order denying a petition "on the merits" does not automatically indicate that the petition was timely filed.

Respondent Chavis, a California state prisoner, filed a state habeas petition on May 14, 1993, which the trial court denied. On September 29, 1994, the California Court of Appeal also held against him. He then waited more than three years before seeking review in the California Supreme Court. On April 29, 1998, that court issued an order stating simply that the petition was denied. On August 30, 2000, Chavis filed a federal habeas petition. After the case reached it, the Ninth Circuit concluded that the federal petition's timeliness depended on whether Chavis' state postconviction relief application was "pending," therefore tolling AEDPA's limitations period, during the 3-year period between the time the California Court of Appeal issued its opinion and the time he sought review in the State Supreme Court. The Ninth Circuit held that the state application was "pending" because under Circuit precedent a denial without comment or ci-

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tation is treated as a denial on the merits, and a petition denied on the merits was not untimely.

Held: The Ninth Circuit departed from *Saffold*'s interpretation of AEDPA as applied to California's system. Pp. 7–12.

(a) Contrary to *Saffold*, the Circuit in this case said in effect that the California Supreme Court's denial of a petition "on the merits" *did* automatically mean that the petition was timely. More than that, it treated a State Supreme Court order that was silent on the grounds for the court's decision as equivalent to an order in which the words "on the merits" appeared. If the appearance of "on the merits" does not automatically warrant a holding that the filing was timely, the *absence* of those words could not automatically warrant such a holding. Absent (1) clear direction or explanation from the California Supreme Court about the meaning of "reasonable time" in the present context, or (2) clear indication that a particular request for appellate review was timely or untimely, the Ninth Circuit must itself examine the delay in each case and determine what the state courts would have held in respect to timeliness. This is what this Court believes it asked the Circuit to do in *Saffold*. This is what this Court believes the Circuit should have done here. Pp. 7–8.

(b) Given the uncertain scope of California's "reasonable time" standard, it may not be easy for the Ninth Circuit to decide in each of the several hundred federal habeas petitions from California prisoners it hears annually whether a prisoner's state-court review petition was timely. However, for the reasons given in *Saffold*, the Circuit's attempt to create shortcuts looking to the label the California Supreme Court applied to the denial order, even where that label does not refer to timeliness, are not true, either to California's timeliness rule or to AEDPA's intent to toll the 1-year limitations period only when the state collateral review proceeding is "pending." *Saffold*, 536 U. S., at 220–221, 225–226. The California courts might alleviate the problem by clarifying the scope of "reasonable time" or by indicating, when denying a petition, whether the filing was timely. And the Ninth Circuit might seek guidance by certifying a question to the State Supreme Court in an appropriate case. *Id.*, at 226–227. Alternatively, the California Legislature might decide to impose more determinate time limits, conforming California law with that of most other States. Absent any such guidance from state law, however, the Ninth Circuit's only alternative is to simply ask and decide whether the state prisoner's filing was made within a reasonable time. In doing so, the Circuit must be mindful that, in *Saffold*, this Court held that timely filings in California fell within the federal tolling provision *on the assumption* that California's "reasonable time" standard would not lead to filing delays substantially longer than those in

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States with determinate timeliness rules. *Id.*, at 222–223. Pp. 8–10.

(c) Chavis did not file his petition for review in the California Supreme Court within a reasonable time. This Court's examination of the record refutes his claim that his 3-year, 1-month, delay was reasonable because he could not use the prison library to work on his petition during this period. And since Chavis needs all but two days of that lengthy delay to survive the federal 1-year habeas filing period, he cannot succeed. Pp. 10–12.

382 F. 3d 921, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–721

MIKE EVANS, ACTING WARDEN, PETITIONER *v.* REGINALD CHAVIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[January 10, 2006]

JUSTICE BREYER delivered the opinion of the Court.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA or Act) requires a state prisoner whose conviction has become final to seek federal habeas corpus relief within one year. 28 U. S. C. §2244(d)(1)(A). The Act tolls this 1-year limitations period for the "time during which a properly filed application for State post-conviction or other collateral review . . . is pending." §2244(d)(2). The time that an application for state postconviction review is "pending" includes the period between (1) a lower court's adverse determination, and (2) the prisoner's filing of a notice of appeal, *provided that* the filing of the notice of appeal is timely under state law. *Carey* v. *Saffold*, 536 U. S. 214 (2002).

In most States a statute sets out the number of days for filing a timely notice of appeal, typically a matter of a few days. See *id.*, at 219. California, however, has a special system governing appeals when prisoners seek relief on collateral review. Under that system, the equivalent of a notice of appeal is timely if filed within a "reasonable time." *In re Harris*, 5 Cal. 4th 813, 828, n. 7, 855 P. 2d

391, 398, n. 7 (1993); see also *Saffold*, *supra*, at 221.

In this case, the Ninth Circuit found timely a California prisoner's request for appellate review made *three years* after the lower state court ruled against him. *Chavis* v. *LeMarque*, 382 F. 3d 921 (2004). We conclude that the Circuit departed from our interpretation of the Act as applied to California's system, *Carey* v. *Saffold*, *supra*, and we therefore reverse its judgment.

I

We begin with our holding in *Carey* v. *Saffold*. In that case we addressed three questions.

A

We initially considered the question just mentioned: For purposes of tolling AEDPA's 1-year limitations period, is a state habeas application "pending" during the interval between (1) the time a lower state court reaches an adverse decision, and (2) the day the prisoner timely files an appeal? We answered this question "yes." 536 U. S., at 219–221. If the filing of the appeal is timely, the period between the adverse lower court decision and the filing (typically just a few days) is not counted against the 1-year AEDPA time limit.

B

We then pointed out that in most States a prisoner who seeks review of an adverse lower court decision must file a notice of appeal in a higher court, and the timeliness of that notice of appeal is measured in terms of a determinate time period, such as 30 or 60 days. *Id.*, at 219. As we explained, however, California has a different rule. In California, a state prisoner may seek review of an adverse lower court decision by filing an original petition (rather than a notice of appeal) in the higher court, and that petition is timely if filed within a "reasonable time." *Id.*, at 221. We asked whether this distinction made a differ-

ence for AEDPA tolling purposes. We answered that question "no." *Id.*, at 222–223. California's system is sufficiently analogous to appellate review systems in other States to treat it similarly. See *id.*, at 222 ("The upshot is that California's collateral review process functions very much like that of other States, but for the fact that its timeliness rule is indeterminate"). As long as the prisoner filed a petition for appellate review within a "reasonable time," he could count as "pending" (and add to the 1-year time limit) the days between (1) the time the lower state court reached an adverse decision, and (2) the day he filed a petition in the higher state court. *Id.*, at 222–223. We added, "The fact that California's timeliness standard is general rather than precise may make it more difficult for federal courts to determine just when a review application (*i.e.*, a filing in a higher court) comes too late." *Id.*, at 223. Nonetheless, the federal courts must undertake that task.

C

We considered finally whether the state habeas petition at issue in the case had itself been timely filed. Saffold had filed that petition (a petition for review by the California Supreme Court) not within 30 or even 60 days after the lower court (the California Court of Appeal) had reached its adverse decision, but, rather, *4½ months* later. The filing was not *obviously* late, however, because the delay might have been due to excusable neglect—Saffold said he had taken 4½ months because he had not received timely notice of the adverse lower court decision. *Id.*, at 226.

We sent the case back to the Ninth Circuit to decide whether the prisoner had filed his California Supreme Court petition within a "reasonable time," thus making the filing timely under California law. We also set forth several legal propositions that set the boundaries within which the Ninth Circuit must answer this question.

First, we pointed out that if "the California Supreme Court had clearly ruled that Saffold's 4½-month delay was 'unreasonable,' that would be the end of the matter." *Ibid.*

Second, we noted that the California Supreme Court order denying Saffold's petition had stated that the denial was "'on the merits and for lack of diligence.'" *Id.*, at 225. But, we added, these words alone did *not* decide the question. *Id.*, at 225–226.

Third, we stated that the words "lack of diligence" did not prove that the California Supreme Court thought the petition was *untimely*. That is because those words might have referred to a totally different, earlier delay that was "irrelevant" to the timeliness of Saffold's California Supreme Court petition. *Id.*, at 226.

Fourth, we stated that the words "on the merits" did not prove that the California Supreme Court thought the petition was *timely*. That is because the California Supreme Court might have decided to address the merits of the petition even if the petition had been untimely. A "court," we said,

> "will sometimes address the merits of a claim that it believes was presented in an untimely way: for instance, where the merits present no difficult issue; where the court wants to give a reviewing court alternative grounds for decision; or where the court wishes to show a prisoner (who may not have a lawyer) that it was not merely a procedural technicality that precluded him from obtaining relief." *Id.*, at 225–226.

We ultimately concluded that *the Ninth Circuit must not take "such words" (i.e., the words "on the merits") as "an absolute bellwether"* on the timeliness question. *Id.*, at 226 (emphasis added). We pointed out that the Circuit's contrary approach (*i.e.*, an approach that presumed that an order denying a petition "on the merits" meant that the petition was timely) would lead to the tolling of AEDPA's

limitations period in circumstances where the law does not permit tolling. *Ibid.* And we gave as an example of the incorrect approach a case in which the Ninth Circuit had found timely a petition for review filed four years after the lower court reached its decision. *Ibid.* (citing *Welch* v. *Newland*, 267 F. 3d 1013 (CA9 2001)).

II

We turn now to the present case. Respondent Reginald Chavis, a California state prisoner, filed a state habeas corpus petition on May 14, 1993. The trial court denied the petition. He sought review in the California Court of Appeal, which also held against him. The Court of Appeal released its decision on September 29, 1994. Chavis then waited more than three years, until November 5, 1997, before filing a petition for review in the California Supreme Court. On April 29, 1998, the California Supreme Court denied the petition in an order stating simply, "Petition for writ of habeas corpus [*i.e.*, review in the California Supreme Court] is DENIED." App. G to Pet. for Cert. 1.

Subsequently, on August 30, 2000 (after bringing a second round of state habeas petitions), Chavis filed a federal habeas petition. The State asked the federal court to dismiss the petition on the ground that it was untimely. After all, AEDPA gives prisoners only one year to file their federal petitions, and Chavis had filed his federal petition more than *four* years after AEDPA became effective. Still, AEDPA also provides for tolling, adding to the one year those days during which an application for state collateral review is "pending." And the federal courts consequently had to calculate how many days Chavis' state collateral review applications had been "pending" in the state courts and add those days to the 1-year limitations period.

Ultimately, after the case reached the Ninth Circuit, that court concluded that the timeliness of the federal

petition turned upon whether the "pending" period included the 3-year period between (1) the time a lower state court, the California Court of Appeal issued its opinion (September 29, 1994), and (2) the time Chavis sought review in a higher state court, the California Supreme Court (on November 5, 1997). The Ninth Circuit held that the state collateral review application was "pending" during this time; hence, it should add those three years to the federal 1-year limitations period, and the addition of those three years, along with various other additions, rendered the federal filing timely.

The Ninth Circuit's reasoning as to why it should add the three years consists of the following:

> "Under our decision in *Saffold, because Chavis's November 1997 habeas petition* to the California Supreme Court *was denied on the merits,* it was pending during the interval between the Court of Appeal decision and the Supreme Court petition and *he is entitled to tolling. See* [*Saffold* v. *Carey,* 312 F. 3d 1031, 1034–1036 (CA9 2002)]. When the California Supreme Court denies a habeas petition without comment or citation, *we have long treated the denial as a decision on the merits. Hunter v. Aispuro,* 982 F. 2d 344, 348 (9th Cir. 1992). *Therefore,* the California Supreme Court's summary denial was on the merits, and *the petition was not dismissed as untimely. See id.; see also Delhomme v. Ramirez,* 340 F. 3d 817, 819, 820 n. 2 (9th Cir. 2003) (noting that there was no indication that a state habeas petition was untimely where the California Supreme Court denied the petition without comment or citation). As a result, Chavis is entitled to tolling during [the relevant period]." 382 F. 3d, at 926 (emphasis added).

California sought certiorari on the ground that the Ninth Circuit's decision was inconsistent with our holding

in *Saffold*. We granted the writ.

III

A

California argues that the Ninth Circuit's decision in this case is inconsistent with our decision in *Saffold*. Like California, we do not see how it is possible to reconcile the two cases.

In *Saffold*, we held that (1) only a *timely* appeal tolls AEDPA's 1-year limitations period for the time between the lower court's adverse decision and the filing of a notice of appeal in the higher court; (2) in California, "unreasonable" delays are not timely; and (3) (most pertinently) a California Supreme Court order denying a petition "on the merits" does not *automatically* indicate that the petition was timely filed. In addition, we referred to a Ninth Circuit case holding that a 4-year delay was reasonable as an example of what the law forbids the Ninth Circuit to do.

Nonetheless, the Ninth Circuit in this case said in effect that the California Supreme Court's denial of a petition "on the merits" *did* automatically mean that the petition was timely (and thus that a 3-year delay was reasonable). More than that, it treated an order from the California Supreme Court that was silent on the grounds for the court's decision as if it were equivalent to an order in which the words "on the merits" appeared. 382 F. 3d, at 926. If the appearance of the words "on the merits" does not automatically warrant a holding that the filing was timely, the *absence* of those words could not automatically warrant a holding that the filing was timely. After all, the fact that the California Supreme Court did not include the words "on the merits" in its order denying Chavis relief makes it *less* likely, not *more* likely, that the California Supreme Court believed that Chavis' 3-year delay was reasonable. Thus, the Ninth Circuit's presumption ("that an order decided entirely on the merits indicates that the

state court did not find the petition to be untimely," *post*, at 4 (opinion of STEVENS, J.)) is not consistent with *Saffold*. See *supra*, at 4.

Neither do the cases cited by the Ninth Circuit provide it with the necessary legal support. The Circuit's opinion in *Saffold* (written on remand from this Court) said nothing about the significance of the words "on the merits." *Saffold* v. *Carey*, 312 F. 3d 1031 (2002). *Hunter* v. *Aispuro*, 982 F. 2d 344 (CA9 1992), predated AEDPA, not to mention our decision in *Saffold*, and in any event concerned an entirely different issue of federal habeas corpus law. *Delhomme* v. *Ramirez*, 340 F. 3d 817 (CA9 2003), addressed the timeliness issue in one sentence in a footnote, *id.*, at 820, n. 2, and did not discuss at any length our opinion in *Saffold*, which must control the result here.

In the absence of (1) clear direction or explanation from the California Supreme Court about the meaning of the term "reasonable time" in the present context, or (2) clear indication that a particular request for appellate review was timely or untimely, the Circuit must itself examine the delay in each case and determine what the state courts would have held in respect to timeliness. That is to say, without using a merits determination as an "absolute bellwether" (as to timeliness), the federal court must decide whether the filing of the request for state-court appellate review (in state collateral review proceedings) was made within what California would consider a "reasonable time." See *supra*, at 3. This is what we believe we asked the Circuit to do in *Saffold*. This is what we believe it should have done.

B

The discrepancy between the Ninth Circuit's view of the matter and ours may reflect an administrative problem. The Ninth Circuit each year must hear several hundred petitions by California prisoners seeking federal habeas

relief. Some of these cases will involve filing delays, and some of those delays will require the federal courts to determine whether a petition for appellate review in a related state collateral proceeding was timely. Given the uncertain scope of California's "reasonable time" standard, it may not be easy for the Circuit to decide in each such case whether the prisoner's state-court review petition was timely. And it is consequently not surprising that the Circuit has tried to create rules of thumb that look to the label the California Supreme Court applied to the denial order, even where that label does not refer to timeliness. For the reasons we gave in *Saffold*, however, we do not believe these shortcuts remain true, either to California's timeliness rule or to Congress' intent in AEDPA to toll the 1-year limitations period only when the state collateral review proceeding is "pending." 536 U. S., at 220–221, 225–226.

The California courts themselves might alleviate the problem by clarifying the scope of the words "reasonable time" in this context or by indicating, when denying a petition, whether the filing was timely. And the Ninth Circuit might seek guidance on the matter by certifying a question to the California Supreme Court in an appropriate case. *Id.*, at 226–227. Alternatively, the California Legislature might itself decide to impose more determinate time limits, conforming California law in this respect with the law of most other States. Indeed, either *state* body might adopt a state-law presumption of the kind the concurrence here suggests. See *post*, at 8–9. In the absence of any such guidance, however, we see no alternative way of applying state law to a case like this one but for the Ninth Circuit simply to ask and to decide whether the state prisoner made the relevant filing within a reasonable time. In doing so, the Circuit must keep in mind that, in *Saffold*, we held that timely filings in California (as elsewhere) fell within the federal tolling provision *on the*

assumption that California law in this respect did not differ significantly from the laws of other States, *i.e.*, that California's "reasonable time" standard would not lead to filing delays substantially longer than those in States with determinate timeliness rules. 536 U. S., at 222–223. California, of course, remains free to tell us if, in this respect, we were wrong.

IV

As we have pointed out, *supra*, at 5, Chavis had one year from the date AEDPA became effective (April 24, 1996) to file a federal habeas petition. Chavis did not actually file his petition in federal district court until August 30, 2000, four years and 128 days after AEDPA's effective date. Hence Chavis' federal petition was timely only if "a properly filed application for State post-conviction or other collateral review [was] pending" for at least three years and 128 days of this time. 28 U. S. C. §2244(d)(2). Under the Ninth Circuit's reasoning Chavis' state collateral review proceedings were "pending" for three years and 130 days, which period (when added to the 1-year federal limitations period) makes the federal petition timely.

As we have explained, however, we find the Ninth Circuit's reasoning in conflict with our *Saffold* holding. And, after examining the record, we are convinced that the law does not permit a holding that Chavis' federal habeas petition was timely. Chavis filed his state petition for habeas review in the California Supreme Court approximately three years and one month after the California Court of Appeal released its decision denying him relief. Chavis tries to explain this long delay by arguing that he could not use the prison library to work on his petition during this time either because (1) his prison job's hours coincided with those of the library, or (2) prison lockdowns confined him to his cell. And, he adds, his inability to use

the library excuses the three year and one month delay—to the point where, despite the delay, he filed his petition for California Supreme Court review within a "reasonable time."

Chavis concedes, however, that in March 1996, App. 38, about a year and a half after the California Court of Appeal denied his habeas petition, he was given a new prison job. He nowhere denies California's assertion, *id.*, at 68, that this new job's working hours permitted him to use the library. And he also concedes that the prison "remained relatively lockdown free" between February 1997 and August 1997, *id.*, at 39, a 6-month period. Thus, viewing every disputed issue most favorably to Chavis, there remains a totally unexplained, hence unjustified, delay of at least six months.

Six months is far longer than the "short period[s] of time," 30 to 60 days, that most States provide for filing an appeal to the state supreme court. *Saffold, supra*, at 219. It is far longer than the 10-day period California gives a losing party to file a notice of appeal in the California Supreme Court, see Cal. App. Ct. Rule 28(e)(1) (2004). We have found no authority suggesting, nor found any convincing reason to believe, that California would consider an unjustified or unexplained 6-month filing delay "reasonable." Nor do we see how an unexplained delay of this magnitude could fall within the scope of the federal statutory word "pending" as interpreted in *Saffold*. See 536 U. S., at 222–223. Thus, since Chavis needs all but two days of the lengthy (three year and one month) delay to survive the federal 1-year habeas filing period, see 382 F. 3d, at 927, he cannot succeed.

The concurrence reaches the same ultimate conclusion in a different way. Unlike the Ninth Circuit, it would not count in Chavis' favor certain days during which Chavis was pursuing a *second* round of state collateral review efforts. See *post*, at 10. Because, as the Ninth Circuit

pointed out, the parties did not argue this particular matter below, 382 F. 3d, at 925, n. 3, we do not consider it here.

For these reasons, the judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 04–721

MIKE EVANS, ACTING WARDEN, PETITIONER *v.* REGINALD CHAVIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[January 10, 2006]

JUSTICE STEVENS, concurring in the judgment.

Today the Court holds that, in the absence of a clear statement by a California state court that a petition for habeas corpus was timely or untimely, a federal court "must itself examine the delay in each case" to determine whether the filing "was made within what California would consider a 'reasonable time.'" *Ante*, at 8. Contrary to the Court's admonition in its next sentence, this is not what we "asked the Circuit to do in *Saffold*," and it is not what "it should have done." *Ibid.* (citing *Carey* v. *Saffold*, 536 U. S. 214 (2002)).

The Ninth Circuit's decision in this case was both faithful to our decision in *Saffold* and consistent with our prior jurisprudence. Instead of endorsing an ad hoc approach to the interpretation of ambiguous judgments entered by California courts in the future, I believe we should direct the Ninth Circuit to apply the straightforward presumptions that I describe below. Rather than a *de novo* review of the record and California law, see *ante*, at 10–11, it is the application of these presumptions, buttressed by an independent error made by the Ninth Circuit, that convinces me that the judgment must be reversed.

I

As the Court has explained, both in *Saffold* and in its opinion today, California's postconviction procedures are unlike those employed by most other States. See 536 U. S., at 221–222; *ante*, at 1, 2–3. California's time limit for the filing of a habeas corpus petition in a noncapital case is more forgiving and more flexible than that employed by most States. See *Saffold*, 536 U. S., at 222. Generally, such a petition "must be filed within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *In re Harris*, 5 Cal. 4th 813, 828, n. 7, 855 P. 2d 391, 398, n. 7 (1993). And the State Supreme Court apparently may exercise its jurisdiction to decide the merits of a petition for habeas corpus at any time whatsoever. See Cal. Const., Art. VI, §10 (giving California Supreme Court original jurisdiction over habeas petitions); *In re Clark*, 5 Cal. 4th 750, 764–765, 855 P. 2d 729, 738 (1993) (noting procedural rules governing habeas petitions are judicially created).

It is the existence of this flexible, discretionary timeliness standard in noncapital cases[1] that gave rise to both the issue presented in *Saffold* and the issue the Court addresses today. In *Saffold*, we considered whether a habeas petition filed in the California Supreme Court 4½ months after the lower state court made its decision was "pending" (and therefore tolled the federal statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)) during that period. See 536 U. S.,

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[1]As California's Deputy Attorney General pointed out at oral argument, this problem does not arise in capital cases because the California Supreme Court has adopted separate rules for such cases. See Tr. of Oral Arg. 63. This is significant because, while prisoners on death row often have an incentive to adopt delaying tactics, those serving a sentence of imprisonment presumably want to obtain relief as promptly as possible.

at 217. After concluding that a state habeas application is pending during the interval between an adverse lower court decision and the filing in the California Supreme Court, and that California's virtually unique system made no difference for purposes of tolling AEDPA's statute of limitations, we were faced with the question whether the state habeas petition in that case had been timely filed. See *id.*, at 221, 223, 225.

Rather than answering the question ourselves, we remanded the case to the Court of Appeals with instructions that it do so. *Id.*, at 226. We also explained why the answer was not entirely clear. In its order the California Supreme Court had stated that it had denied the petition both "on the merits and for lack of diligence." *Id.*, at 218 (internal quotation marks omitted). We pointed out that the fact that the State Supreme Court had reached the merits did not preclude the possibility that its alternative basis for decision—"lack of diligence"—expressed a conclusion that the 4½-month delay was unreasonable and therefore that it had considered the petition untimely as a matter of state law. On the other hand, we also recognized that "lack of diligence" might have referred to the respondent's earlier failure to file his first postconviction petition more promptly, "a matter irrelevant to the question whether his application was 'pending' during the 4½-month interval." *Id.*, at 226. Our opinion requested the Court of Appeals to resolve the ambiguity, noting that it might be "appropriate to certify a question to the California Supreme Court for the purpose of seeking clarification in this area of state law." *Id.*, at 226–227.[2]

On remand in *Saffold*, after reviewing three fairly contemporaneous California Supreme Court orders that involved delays of 7 months, 18 months, and 15 months

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[2]This approach would apparently prove fruitless. See Tr. of Oral Arg. 31.

without mentioning any "lack of diligence," the Court of Appeals came to the quite reasonable conclusion that the State Supreme Court's "lack of diligence" notation in the order denying Saffold's petition referred to an earlier 5-year delay that was irrelevant to the tolling issue rather than to the 4½-month delay that had preceded his most recent filing. See *Saffold* v. *Carey*, 312 F. 3d 1031, 1035 (CA9 2002). It also noted "that we have not been asked to provide any bright-line rule for determining what constitutes 'unreasonable' delay under California's indeterminate timeliness standard. While such a bright-line rule would certainly be welcomed, . . . such an issue is more appropriately decided by the California Supreme Court or the California State Legislature." *Id.*, at 1036, n. 1.

As both Judge O'Scannlain—who wrote for the Court of Appeals—and I understood the rule of law that animated our remand, it was predicated on the assumption that the answer to the timeliness question depended on what the California Supreme Court had *actually decided* rather than on any conclusion that the Court of Appeals itself might reach concerning the reasonableness of the 4½-month delay under California law. See *id.*, at 1034. That assumption, also applied by the Ninth Circuit here, was consistent with the unequivocal assertion in our opinion that if the California Supreme Court had "clearly ruled" that the 4½-month delay was unreasonable, "that would be the end of the matter," even if the court had also ruled on the merits. *Saffold*, 536 U. S., at 226.

Similarly, there is no inconsistency between our conclusion in *Saffold* that the merits ruling "does not *automatically* indicate that the petition was timely filed," *ante*, at 7, and the presumption applied by the Court of Appeals in this case that an order decided entirely on the merits indicates that the state court did not find the petition to be untimely, see App. A to Pet. for Cert. 9, particularly when California allows the petitioner to advance a variety of

reasons to excuse a late filing, see, *e.g.*, *In re Robbins*, 18 Cal. 4th 770, 780–782, 959 P. 2d 311, 318 (1998). Our rejection of the words "'on the merits'" as "an absolute bellwether" was made in a case in which the order itself indicated that the state court might have considered the petition untimely. *Saffold*, 536 U. S., at 226. Given that ambiguous order, *Saffold* did not foreclose the Court of Appeals' presumption that, by dismissing a petition solely on the merits, the state court necessarily found the filing to be timely. The Court of Appeals' opinion in this case was therefore completely consistent with both our holding and our reasoning in *Saffold*.

II

The Court of Appeals' opinion was also consistent with our prior habeas jurisprudence. While the present question requires us to apply the tolling provision of a federal statute, application of that provision ultimately rests on state-law procedural rules. See 28 U. S. C. §2244(d)(2) (tolling federal statute while "properly filed" application for state postconviction relief is pending). To the extent that a possibly decisive state-law requirement is at issue, application of AEDPA's tolling provision is analogous to the question whether denial of a state postconviction petition rested upon an adequate and independent state ground.

Faced with such a question, it has been our general practice to try to determine the actual basis for the state court's decision rather than to resolve the state-law issue ourselves. The mere fact that a federal petitioner failed to abide by a state procedural rule does not prevent a federal court from resolving a federal claim unless the state court actually relied on the state procedural bar "as an independent basis for its disposition of the case." *Harris* v. *Reed*, 489 U. S. 255, 261–262 (1989) (internal quotation marks omitted). This practice is consistent with the rule

of *Michigan* v. *Long*, 463 U. S. 1032, 1042 (1983), that unless it is "clear from the opinion itself" that the state court's decision rested on an adequate and independent state ground, we have appellate jurisdiction to review its resolution of a federal constitutional question. And in cases in which a state-court order is silent as to the basis for its decision, we have resorted to a presumption to reflect the role intended for such orders by the state court that issued it. See *Ylst* v. *Nunnemaker*, 501 U. S. 797, 803–804 (1991).

Until today, however, we have not directed the lower federal courts to decide disputed issues of state procedural law for themselves instead of focusing on the actual basis for a state-court ruling. The Ninth Circuit's decision in this case was entirely consistent with our past practice, and I would adhere to that practice in confronting the question whether habeas petitions advancing federal claims in California courts were filed within a reasonable time as a matter of California law. Cf. *Brooks* v. *Walls*, 279 F. 3d 518, 522 (CA7 2002) (Easterbrook, J.) (applying *Harris* and *Ylst* to AEDPA's "properly filed" requirement). The inquiry, then, should focus on what the state court actually decided rather than what a federal court believes it could, or should, have done.

III

Determining what the California Supreme Court has "actually" decided is sometimes easy and sometimes difficult. Its rulings denying habeas corpus petitions generally fall into three broad categories: those expressly deciding the timeliness question, those deciding the merits without comment on timeliness, and those that do not disclose the basis for the decision.[3] To simplify the inquiry, a straightforward rule can be applied to each type of order.

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[3]Orders resting on alternative grounds, such as the one in *Carey* v. *Saffold*, 536 U. S. 214 (2002), may require special consideration.

The easiest cases, of course, are those in which the state court-order expressly states that a petition was either untimely or timely. As we have explained, if the state court's untimeliness ruling is clear, "that would be the end of the matter," even if the court had also ruled on the merits. *Saffold*, 536 U. S., at 226. Conversely, an unequivocal holding that a delay was not unreasonable should be respected even if a federal judge would have decided the issue differently.[4] The decision that a petition has been untimely filed need not be explicitly stated; citation to a case in which a petition was dismissed as untimely filed certainly would suffice.[5] Cf. Brief for Petitioner 27; *Robbins*, 18 Cal. 4th, at 814, n. 34, 959 P. 2d, at 340, n. 34 (explaining California's practice of citing certain cases for certain propositions).

More difficult are those cases in which the state court rules on the merits without any comment on timeliness. The Ninth Circuit deals with this situation by applying the presumption that a ruling on the merits, *simpliciter*, means that the state court has concluded that the petition was timely. The Court today seemingly assumes—incorrectly—that we rejected that presumption in *Saffold*. Even if we did so *sub silentio*, however, I am convinced that the Court should now endorse the Ninth Circuit's presumption because it is both eminently sensible as a matter of judicial administration and entirely sound as a matter of law. Cf. *Robbins*, 18 Cal. 4th, at 814, n. 34, 959 P. 2d, at 340, n. 34 (explaining that when the State argues that a procedural bar applies, and the California Supreme

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[4] At oral argument, California's Deputy Attorney General agreed that if the California Supreme Court had expressly decided that respondent Chavis' state habeas petition included a satisfactory explanation for the 3-year delay preceding his filing in that court, but decided against him on the merits, the federal statute of limitations would have been tolled. See Tr. of Oral Arg. 19–20.

[5] As I point out, *infra*, at 10, this is such a case.

Court's order does not cite a case imposing that bar, it means the claim is not barred on the asserted ground). The interest in the efficient processing of the dockets of overworked federal judges provides powerful support for relying on a presumption rather than engaging in *de novo* review of the questions whether the length of a delay was excessive, whether the petitioner's explanation for the delay would be considered acceptable by a California court, and whether a nonetheless unreasonable delay should be excused because the petition raises an unusually serious constitutional question. Cf. *id.*, at 779–782, 959 P. 2d, at 317–318.

There are, of course, cases in which the Ninth Circuit's presumption may not be accurate. For example, a state court may find the deficiencies in a claim so clear that it is easier to deny it on the merits than to decide whether excuses for an apparently unreasonable delay are sufficient. But whereas California judges may continue to follow the easier route, under today's holding federal judges apparently must answer the timeliness question no matter how difficult it may be and no matter how easy it is to resolve the merits. A simple rule, applicable to all unambiguous rulings on the merits, is surely far wiser than the novel ad hoc approach that the Court appears to endorse today.

A general rule could also apply to the most difficult situation, which arises when the state court denies a petition with no explanation or citation whatsoever. Unlike an order that indicates that a state court has ruled on the merits, a silent order provides no evidence that the state court considered and passed upon the timeliness issue. To resolve such cases, I would adopt a presumption that, if a California court issues an unexplained order denying a petition filed after a delay of less than six months, the court considered that petition to be timely; unexplained orders following a longer delay should be

presumed to be decisions on timeliness grounds. California's use of a 6-month period for determining presumptive timeliness in postconviction capital litigation—the only specific time period mentioned in California's postconviction jurisprudence—provides a principled basis for such a double-barreled presumption. See Cal. Rules of Court Policy Statement 3, std. 1–1.1 (Deering 2005) ("A petition for a writ of habeas corpus [in a capital case] will be presumed to be filed without substantial delay if it is filed within 180 days after the final due date for the filing of appellant's reply brief on the direct appeal . . ."). Moreover, a 6-month presumption would be fully consistent with our holding in *Saffold* that the 4½-month delay in that case was not necessarily unreasonable.[6]

IV

The above standards provide me with two independently sufficient reasons for concluding that the California Supreme Court actually decided—not once, but twice—that the petitions filed by respondent in that court were untimely. In one order, the State Supreme Court made its finding of untimeliness explicit; in the other, the 6-month presumption should control.

First, as the Court notes *ante*, at 5, the California Supreme Court entered an order denying respondent habeas relief on April 29, 1998, and respondent did not file his federal petition for habeas corpus until August 30, 2000—more than a year later. The Court of Appeals found that the federal statute of limitations was tolled during this 16-month period by a second set of state habeas petitions

[6]The fact that a 6-month presumption would probably lead to the result that noncapital habeas petitions filed by California prisoners would be pending for somewhat longer periods than those filed in other States is attributable to the peculiar features of California's postconviction review procedures. It is far wiser to place the responsibility for that consequence on the State, which can readily modify its procedures, than unnecessarily to complicate the work of federal judges.

that respondent initiated in the California trial court on January 25, 1999, and that concluded with the entry of an order by the California Supreme Court on April 28, 2000. See App. A to Pet. for Cert. 11–12. That finding was erroneous.

The California Supreme Court's April 28, 2000, order, unlike its 1998 order, was not silent. Instead, the April 2000 order cited three earlier California Supreme Court cases, two of which stand for the proposition that a petition has been untimely filed. See *id.*, at 5; *Robbins*, 18 Cal. 4th, at 814, n. 34, 959 P. 2d, at 340, n. 34. Although the State did not argue that respondent's second habeas filing in the California Supreme Court was untimely, see App. A to Pet. for Cert. 8, n. 3, there is not even an arguable basis for disputing that the California Supreme Court found respondent's second habeas petition to have been untimely filed. Given this finding by the State Supreme Court, the Ninth Circuit clearly erred (although not for the reasons claimed by the Court).

Second, respondent's November 5, 1997, state habeas petition was filed with the California Supreme Court more than three years after the California Court of Appeal denied review. *Ante*, at 5. The State Supreme Court denied that petition without explanation. *Ibid.* The presumption I described above—that an unexplained order following a delay longer than six months was based on the state court's conclusion that the petition was untimely—provides me with a sufficient reason for concluding that respondent's state habeas petition was not pending during that 3-year interval. Consequently, respondent's federal habeas petition was also untimely and should have been denied.

Accordingly, despite my profound disagreement with the reasoning in the Court's opinion, I concur in its judgment.